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FEDERAL WATER POWER ACT

HEARING

BEFORE

THE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

SEVENTY-SECOND CONGRESS
SECOND SESSION

ON

H. R. 11675

TO AMEND THE FEDERAL WATER POWER ACT
AS AMENDED

JANUARY 31, FEBRUARY 1 AND 2, 1933

Printed for the use of the
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FEDERAL WATER POWER ACT

TUESDAY, JANUARY 31, 1933

HOUSE OF REPRESENTATIVES,
COMMITTEE OF INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a.m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

We have under consideration this morning H. R. 11675, introduced by Mr. Shallenberger. It has to do with a proposal to amend the Federal water power act. A copy of the bill will be made a part of the record.

(H. R. 11675 is as follows:)

[H. R. 11675, Seventy-second Congress, first session]

A BILL To amend the Federal water power act, as amended

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal water power act, as amended, is amended by adding after section 20 a new section as follows:

"SEC. 20a. (1) It shall be unlawful (A) for any licensee hereunder or for any person affiliated with a license, or (B) if such action tends to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, for any corporation engaged in transmitting or receiving electrical energy across any State boundary, or for any person affiliated with such corporation, or for any person purchasing power from any such licensee or corporation or from any person affiliated with such licensee or corporation for sale and distribution or use in public service (hereinafter in this section referred to in each case as the seller), to sell or offer for sale electrical energy in one community at a rate or rates higher than the rates at which electrical energy is sold or offered for sale in another community by the seller or a person affiliated with the seller, unless there is a difference in the cost (as referred to under the provisions of subdivision (7) (B)) to furnish a like service in the said communities; and the rate or rates in the community having the higher cost shall not exceed the rate or rates for a like service in the community having the lower cost by a greater percentage than the percentage difference in said cost to furnish the service, except as hereinafter provided.

"(2) Jurisdiction to enforce the above provision is hereby conferred upon the commission upon the complaint of any party aggrieved or upon its own initiative; and in any such case the commission shall have power to prescribe the rate or rates thereafter to be charged, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

"(3) When the seller or any person affiliated with the seller may be experiencing in any community the competition of a municipal corporation engaged in selling electrical energy to the public at rates insufficient to fully reimburse said municipal corporation for the cost (as defined in subdivision (7) (C)) to deliver the electrical energy so sold, the rate or rates at which the seller or person affiliated with the seller is selling or offering for sale electrical energy to the public in that community shall not be taken into consideration in determining the lawfulness or unlawfulness, under the provisions of this section, of rates charged elsewhere.

"(4) The act of selling or offering for sale electrical energy at different rates for like service shall be deemed to be prima facie evidence of a violation of this section; and the burden of proof shall be upon the seller to prove when rates are different in two different localities that such a difference does not tend to unduly prejudice or unjustly burden interstate commerce, and to prove the actual difference and the percentage difference in cost which it may allege exists in furnishing a like electrical service in different communities and to show that a rate offered or charged in competition with a municipal corporation should not be taken into consideration in determining the lawfulness or unlawfulness, under the provisions of this section, of rates charged elsewhere.

"(5) It shall be unlawful for any person described in subdivision (1) to sell all or any part of this property used and useful in the business of distributing electrical energy to the public except at a price and to a purchaser and under terms and conditions approved by the commission; but the price at which such property in any State may be sold shall not be less than the value of that property properly allocated from the aggregate total value of the property of the seller in that State returned by it for rate-making purposes to the State agency, if any, having jurisdiction over its rates; and if no such State agency exists, then from the aggregate total book value of the property of the seller in that State. No such sale shall be approved by the commission except after a finding that such sale will not have the effect of permitting an evasion of the provisions of this act; and any such sale which results in an evasion of the provisions of this act shall be void.

"(6) Any person or, in the case of a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other person or corporation, shall willfully do or cause to be done or shall knowingly suffer or permit to be done, any act, matter, or thing prohibited by this section or declared to be unlawful, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than $1,000 nor more than $5,000 or imprisoned for a term of not less than six months nor more than two years, or both such fine and imprisonment, and each day such violation continues beyond thirty days shall be deemed a separate offense.

"(7) For the purposes of this section—

"(A) The word 'community' shall be construed to be any area within which the rates of the seller are the same to all consumers for a like class of electrical service.

"(B) In determining the cost to deliver electrical energy in any community the property of the seller or any person affiliated with the seller alleged to be used and useful in delivering electrical service to that community shall be properly allocated to that community and to it shall be assigned a value properly allocated from the aggregate total value of the property of the seller and person affiliated with the seller returned for rate making purposes to the State agency, if any, having jurisdiction over its rates in the State in which said community is located, or from the aggregate total book value of said property in said State if no such agency exists therein.

"(C) The cost to a municipal corporation to deliver electrical energy to the public shall be deemed to include its expenses in operating and maintaining and the interest accrued on, and a reasonable sum (as defined in paragraph (D)) for expected depreciation on, that part of the investment and property of said municipal corporation used in so delivering electrical energy, and in addition a sum equal to the accrued tax that could be properly assessed thereon by said municipal corporation had the same been owned by the seller.

"(D) The reasonable annual sum for expected depreciation shall be deemed to be that sum which, if invested semiannually in the bonds of the said municipal corporation at market prices, would yield a sum sufficient to enable the said municipal corporation to replace at the expiration of their respective lives the several parts and elements of its said property used in furnishing electrical energy to the public.

"(E) 'Person' means any individual, private corporation, partnership, or association.

"(F) Two or more persons shall be deemed to be affiliated if they are members of a group, composed of a parent and its subsidiaries and of other corporations, of which each member except the said parent is a subsidiary of some other member of the group.

"(G) 'Parent' means any person or group of persons controlling one or more corporations or the operations or management thereof, whether by ownership or control of stock, or by interlocking directorates, or otherwise. The ownership or control by any such person or group of persons of 15 per cent or more of the stock of any corporation shall be prima facie evidence of the control of such corporation and of its operations or management by such person or group of persons. A corporation to which such person or group of persons sustains the relationship of parent is herein termed a 'subsidiary' of such person or group of persons."

SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of the act and the application of such provisions to other persons or circumstances shall not be affected thereby.

The CHAIRMAN. The committee has before it a report from the Federal Power Commission and I will ask the clerk of the committee to read it.

(The clerk of the committee read the report above referred to as follows:)

FEDERAL POWER COMMISSION,
Washington, January 28, 1933.

Hon. SAM RAYBURN,
Chairman Committee on Interstate and Foreign Commerce,
House of Representatives.

MY DEAR MR. CHAIRMAN: Pursuant to letter from Representative Shallenberger relative to H. R. 11675, introduced to amend the Federal water power act, and a letter from Senator Norris in regard to S. 4496, covering the same subject, and requesting conference by the commission with Messrs. Allison R. Williams and Charles D. Drayton, in regard thereto, and for a commission report on this bill, we have the honor to advise:

Several conferences have been had with Messrs. Williams and Drayton, in the course of which the commission was advised that the committee desired chiefly an expression of opinion as to the general purpose and objective of the bill but would not expect a detailed or critical study of the machinery of the bill, nor of any constitutional questions which may be involved, as these matters had already been given careful consideration by the committee or those who are advising with the committee in regard to this proposed legislation. Therefore, we are for the present only making general comment on the main purpose of this proposed legislation, but would be glad to assist the committee in its hearing or otherwise in such further study and suggestions as the committee may deem desirable.

The purpose of this bill is clearly to prevent unfair and destructive competition through discriminatory rates between privately owned electric utility companies and municipal plants and with this general purpose the commission is in thorough and unanimous agreement and is of the opinion that such destructive rate practices should be prevented in the public interest and that the proposed legislation, in its purpose, is in complete harmony with, and an attempt to make more effective, the expressed intent of the first sentence of section 20 of the Federal water power act, as follows:

"SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service, shall be reasonable, nondiscriminatory, and just to the customer, and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful * * *."

The proposed bill would add to the authority given in sections 19 and 20 of the Federal water power act by the provisions of subsection 2 on page 2, starting at line 20, the following jurisdiction:

"(2) Jurisdiction to enforce the above provision is hereby conferred upon the commission upon the complaint of any party aggrieved or upon its own initiative; and in any such case the commission shall have power to prescribe the rate or rates thereafter to be charged, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

This broad vesting of jurisdiction in the commission, taken together with other provisions in the bill, would seem to clearly extend and enlarge the present jurisdiction of the commission so as to include power companies other than licensees or customers of licensees, as is provided in the present act. Such extension of jurisdiction is, of course, a matter for determination by your committee and by Congress and we assume that either a detailed study has been made or will be made as to the machinery and specific provisions of the act which would be affected by this amendment, in order to insure harmony between the act and the proposed amendments. In passing, it is to be observed that the placing of the burden of proof (as provided in subsection 4) seems to be highly desirable in the cases given.

The commission desires to reiterate its opinion that destructive rate wars between private companies and municipal plants should be prevented by the contemplated or other appropriate legislation, and stands ready to serve your committee in any way it possibly can toward the furtherance of this purpose.

Yours very cordially,

GEO. OTIS SMITH, *Chairman.*

The CHAIRMAN. Mr. Shallenberger, as the author of the bill, do you wish to make a statement?

Mr. SHALLENBERGER. Just a brief statement, Mr. Chairman. The history of this bill is that Allison R. Williams, who is here with his associates, drafted the bill. His father, Senator Williams, had addressed a letter to the Speaker asking him to see that this bill was brought to the attention of Congress. The Speaker referred Senator Williams's letter to me. As a member of the committee I introduced it, as I am in favor of the purposes and principles of the bill.

Just briefly, I want to state to the committee that it seeks, as I interpret it, to put into Federal practice the same principles of law to prevent destructive competition that we now have in a number of States. This bill attempts to apply the same principle to the sale of electric power in interstate commerce and therefore comes before our committee.

I just want to read to the committee this language, and then I am going to turn the presentation of the matter over to Mr. Williams and his associates. The bill provides that it shall be unlawful—

to sell or offer for sale electrical energy in one community at a rate or rates higher than the rates at which electrical energy is sold or offered for sale in another community by the seller or a person affiliated with the seller, unless there is a difference in the cost (as referred to under the provisions of subdivision (7) (B)) to furnish a like service in the said communities; and the rate or rates in the community having the higher cost shall not exceed the rate or rates for a like service in the community having the lower cost by a greater percentage than the percentage difference in said cost to furnish the service, except as hereinafter provided.

(2) Jurisdiction to enforce the above provision is hereby conferred upon the commission upon the complaint of any party aggrieved or upon its own initiative; * * *

That is the sole purpose of the bill, Mr. Chairman. It has been introduced because of experiences that they have had in a number of States. Senator Norris has introduced a similar bill in the Senate. Some of these larger power corporations have sought to destroy the competition of local power companies, some of them

municipally owned, by making an unfair rate. This bill seeks to correct that kind of situation.

Mr. GARBER. Does this bill exempt municipally owned power plants?

Mr. SHALLENBERGER. No; it does not exempt them. It does not seek to classify any power company. It applies generally.

Mr. GARBER. What is your suggestion with regard to the advisability of such exemption, where the people own the plant and are operating it purely for the public interest and not for profit?

Mr. SHALLENBERGER. Mr. Garber, I do not know what you have in mind as to the matter of exemption. But I do not think this bill would affect adversely any municipally owned plant. It would really prevent large power companies from competing unfairly against municipal plants by making a lower rate than the local plant finds necessary to sustain itself.

Mr. GARBER. The reason for my inquiry is this: In the district which I represent there is a city of about 15,000 population that owns and operates its own plant. It has been doing it successfully for years, at a profit to the city. The revenues are turned in to the city. I was wondering whether this would interfere with that kind of operation?

Mr. DRAYTON. May I say, there is nothing to interfere with that right on the part of the municipality? In fact, this bill is directed to that very situation for the purpose of protecting a municipality conducting its business in that way.

Mr. SHALLENBERGER. Mr. Chairman, that is all I care to say at this time.

The CHAIRMAN. I see that Mr. Williams is here; also the chairman of the Federal Power Commission. Which of these gentlemen would like to make the first statement?

Mr. WILLIAMS. That is entirely immaterial to us, Mr. Chairman. I might say that I asked Mr. Ryan, general counsel to the Federal Power Commission, where they wanted to come in, and he said that it did not make much difference, but he would rather come in after a good deal of the argument had been had.

The CHAIRMAN. Probably they would rather have your statement first, as you are the proponents of the bill. We will proceed and hear Mr. Williams at this time.

STATEMENT OF ALLISON R. WILLIAMS, OF MISSISSIPPI, CONSULTING ENGINEER; PRESENT RESIDENCE 2239 Q STREET NW., WASHINGTON, D. C., AND ATLANTA, GA.

Mr. WILLIAMS. Mr. Chairman and gentlemen, the evident purpose of the bill is to give a fair protection against destructive rate wars to electric enterprises by declaring unlawful a rate system having certain characteristics as described in the bill. When the electric rates of a private electric utility are based upon a property valuation in which there is no inflation, there is, and can be, no incentive for the construction of a municipal electric enterprise; but when people organized into municipal corporations are convinced that they are paying electric rates based on grossly inflated valuations, they should have the right to relieve themselves from excessive

charges by creating for themselves a municipal electric system and the right to operate the same under fair competitive conditions. The bill undertakes to provide that these competitive conditions shall be fair.

The bill makes it unlawful for a private electric utility subject to the jurisdiction of the commission to maintain a system of rates under which it offers in any municipal territory in which a municipal electric enterprise may operate, rates below the municipal rates therein unless—

(1) The rates of the private electric utility are either—

(*a*) Uniform in all communities served by it, including said municipality, or

(b) Higher in one community than in another served by it by no greater percentage than the percentage difference in the cost to deliver a like electric service in the two communities, or—

unless—

(2) The municipal rates are not high enough to reimburse the municipal corporation for all its cost of operation and maintenance, the interest charges on its municipal investment represented by that part of its property used to deliver to its consumers their requirements of electrical energy, plus a reasonable charge for expected depreciation, and are not high enough to produce in addition, for the municipal corporation, a profit equal to the amount that would be paid as taxes on said part of the municipal electric property if it were privately owned.

I might say right at this point, that the requirement of a profit equal to said taxes is as you can see, to keep the municipality from turning the tables right around and competing unfairly by using their taxing power against the private company.

When any one of these three rate conditions exist it is not unlawful under the bill for the said private electric utility to offer rates below said municipal rates; but when no one of said three rate conditions exists the offering of said rates is declared unlawful. The provisions of the bill are equitable both for the municipality and also for any said private electric utility.

There can be no fair objection to the passage of the bill either by municipalities or private electric utilities. Objection, if any, can only come from private electric utilities which are earning the allowed annual percentage rate of return upon inflated valuations returned to the State regulatory agency for rate-making purposes; and which are desirous of preventing a practical demonstration by others, under fair conditions, that a resonable return on true investment can be earned at substantially lower rates.

Private electric utilities who oppose municipal operation of an electric utility base their arguments upon their claim that they can operate an electric utility at rates which will yield to them a reasonable return upon the fair value of their property but at the same time rates under which no municipality could earn its fixed charges if, in the municipal costs, a fair charge for depreciation and a fair charge in lieu of taxes are included. The bill provides that before it can give any protection to a municipality from the unfair competition of a private electric utility the municipal rates must be high enough to yield all municipal operating, maintenance, and

fixed charges on that proportion of the municipal electric property used to deliver the electric service, and in addition a reasonable depreciation charge and a further sum equal to taxes to which its said property would be subject if privately owned. If the municipal rates are not high enough to accomplish this result, the private electric utility may meet the situation by a rate war as if this bill had not been enacted into law.

Thus the bill, while protecting municipalities, gives a reasonable and practical protection to private electrical utilities against unfair municipal competition in that it leaves it open to the private electrical utility to engage in a rate war with the municipal electrical uility so long as the municipality may sell electricity at prices which will not yield to the municipality a net profit equal to the taxes to which its said property would be subject if privately owned. Thus the bill meets squarely the objections which large private electric utilities have urged against municipal ownership and operation of electric utilities, viz., that private electric utilities should not be subjected to the competition of a municipality which resorts to its power of taxation to recoup its losses on municipal operation.

What is the necessity for the legislation embodied in the bill? What are the abuses, actual or potential, against which an effective remedy should, in the public interest, be provided by law?

The power granted to State regulatory agencies in respect of fixing electric rates is in general only the power to fix maximum rates for electric service. The large private electric utilities exercising a de facto monopoly of supply within enormous territories generally claim the right and exercise the power, when it suits their purpose, to make any rates they please in any community served by them not in excess of the maximum rates allowed by State regulator yagencies. They have used this power in order to destroy a new municipal electric undertaking, created in the monopolistic territory, by the device of slashing rates in the territory of the new municipal electric undertaking to any low level they please while maintaining the said maximum rates in the balance of the monopolistic territory. They have used this power ruthlessly in an effort to kill municipal competition and to preserve at all hazards a monopoly of electric supply in the whole of their said monopolistic territory. By the exercise of this power private electric utilities have endeavored to frighten all municipalities desirous of creating municipal electric systems as a means of obtaining relief from what they regarded as exorbitant rates based on inflated valuations and from which they believe relief can not be obtained by any other means. By its exercise they endeavor to frighten away bankers who, in other circumstances, would be glad to finance a municipal electric enterprise on fair terms.

The power of the private electric utilities to maintain maximum rates in a large monopolistic territory at all but one point, and at that point to reduce rates with zero as the limit for the purpose of destroying a competing electric enterprise, is the power to commit industrial sabotage. What the bill undertakes to do is to deprive these large private electric utilities of their claimed right to exercise that arbitrary and destructive power.

That the danger is real and that the abuse is actual, and may be repeated in every circumstance in which a municipality may seek

to defend the legitimate interests by the construction of a municipal electric undertaking, may be illustrated by calling attention to a recent example of the exercise of the said arbitrary and destructive power.

This example occurred in the year 1930 in the State of Georgia in the county of Crisp, where a hydroelectric plant was constructed on Flint River by the county of Crisp for the stated purpose of relieving its citizens from high electric rates based on grossly inflated valuations and of developing that county industrially. At that time the county of Crisp was a part of the monopolistic territory of Georgia Power Co. The county of Crisp attempted to acquire the distribution system of the Georgia Power Co. in that county by purchase. The power company refused to negotiate. Thereupon the county of Crisp acquired a newly constructed distribution system of its own and began the municipal distribution of electrical energy to the public in Crisp County at rates 10 per cent less than the maximum rates allowed to and then being charged by Georgia Power Co. everywhere in its monopolistic territory which covered about 90 per cent of the State of Georgia.

The power company met this act of Crisp County to serve its own citizens by reducing its rates 35 per cent in Crisp County while maintaining its allowed maximum rates in the balance of said 90 per cent of the State of Georgia. At that time the consumption of electricity in Crisp County was, at the said maximum allowed rates, about $100,000 per annum. To cut its rates 35 per cent in that county, viz, to reduce its gross revenue from that county by $35,000 per annum, meant little or nothing to the power company, because its gross revenues from the sale of electricity in Georgia approximated $20,000,000 per annum. But a cut of 35 per cent in an effort to destroy the electric enterprise and the credit of Crisp County meant a great deal to the citizens of that county. What was important to the power company was that no municipal electric enterprise should have the opportunity to demonstrate, under the same fair conditions which the power company was enjoying in the conduct of a monopoly business, that it was practical and economically feasible for a municipal electric enterprise to offer rates much less than the maximum rates allowed to and being charged by the power company. If such a demonstration were made, new and important difficulties would be created which would endanger the continued recognition of inflated property valuations for rate-making purposes.

Citizens of Georgia in other parts of the State learning of the said 35 per cent cut in rates in Crisp County applied to the Georgia Public Service Commission for relief from the high rates they alleged they were paying for electricity and cited the circumstances in Crisp County. The Georgia Power Co. sought the aid of the courts to prevent by injunction said Public Service Commission from acting in the matter and on August 30, 1930, presented to the superior court of Fulton County, Ga., a petition asking for said injunction, in which was boldly set out the right which the Georgia Power Co. claimed viz, the right without interference by the commission to make any rate it pleases anywhere in the State, provided only that the rates do not exceed the maximum rates allowed by the commission. The following quotation from said petition for injunction

sets out the power in respect of rates claimed by said power company, viz:

> Petitioner avers that the rates heretofore fixed by the Georgia Public Service Commission applicable to petitioner's business in Cordele (the county seat of Crisp County, Ga.), are maximum rates and that petitioner has the right without action by said Georgia Public Service Commission in its own discretion to charge any rate it pleases not in excess of such maximum rate. Under the laws of the State of Georgia the said Georgia Public Service Commission is without power or authority to fix any rates other than maximum rates and that under the law petitioner has the right to fix rates in its own business judgment provided such rates so fixed do not exceed the maximum rates.

No action was taken by the Georgia Public Service Commission to interfere with the exercise of said claimed right.

It is doubtful whether there is anything in the laws of any State which specifically makes unlawful the system of rates made unlawful by the bill. There is nothing in the laws of the United States which specifically makes that system unlawful. There ought to be, in so far as the United States may have jurisdiction. This jurisdiction extends to licensees under the Federal water power act and to interstate electric companies. The people, when organized into municipal corporations, whether into municipalities as heretofore organized or into municipal corporations which may be hereafter organized as " power districts " pursuant to new laws, ought to have the clear legal right, when themselves free from unfair competitive practices, to distribute to their citizens, when empowered to do so as the result of a referendum, electric energy free from the menace of the use of that power to destroy their property and credit so boldly claimed by Georgia Power Co. in the Crisp County matter. Municipal corporations everywhere ought to have the right to deal for their financing with bankers unafraid of the right now claimed by the large private utilities to destroy municipal electric undertakings and credit by the device of ruthlessly slashing rates in a particular locality while maintaining rates at the maximum elsewhere until the credit of the municipal competitor has been destroyed and its property has been acquired by the large private electric utility. Congress is the only power able to give relief promptly throughout the territory of the United States. Its example would be a stimulant to State actions in taking jurisdiction in circumstances beyond the power of Congress.

That is all, Mr. Chairman, so far as a general statement of the bill is concerned.

There is just one matter that I think might be appropriate to direct to the attention of the committee. I would just like to read a few quotations from the speech of Governor Roosevelt on the electric-power question at Portland, Oreg., and draw some conclusions therefrom in connection with this bill.

> As I see it, the object of government is the welfare of the people. The liberty of people to carry on their business should not be abridged unless the larger interests of the many are concerned. The interests of the few must yield. It is the purpose of government to see not only that the legitimate interests of the few are protected but that the welfare and rights of the many are conserved. These are the principles which we must remember in any consideration of this question. This, I take it, is sound government—not politics. Those are the essential basic conditions under which government can be of service.

Then he goes on to say that in spite of the fact that theoretically all public utilities are regulated and justly so in order that they would have reasonable rates and good service, it is impossible at all times simply by regulation and supervision to accomplish that. Here is what he says:

I do not hold with those who advocate Government ownership or Government operation of all utilities. I state to you categorically that as a broad general rule the development of utilities should remain, with certain exceptions, a function for private initiative and private capital.

But the exceptions are of vital importance, local, State, and National, and I believe that the overwhelming majority of the people of this country agree with me.

Again we must go back to first principles; a utility is in most cases a monopoly, and it is by no means possible in every case for Government to insure at all times from mere inspection, supervision, and regulation, that the public should get a fair deal—in other words, to insure adequate service and reasonable rates.

I therefore lay down the following principle: That where a community, a city or county or a district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government, one of its functions of home rule, to set up, after a fair referendum has been taken, its own governmentally owned and operated service.

That right has been recognized in most of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates.

It is perfectly clear to me and to every thinking citizen that no community which is sure that it is now being served well and at reasonable rates by a private utility company will seek to build or operate its own plant.

But on the other hand, the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility a "birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where mere scolding does any good."

There is no question but that any municipality has the right, if it believes that the private utility serving them is not giving them good service at reasonable rates, to put up a municipally-owned and operated plant and that should, and ordinarily would, act as this birch rod in the cupboard. But when a private utility claims the right and apparently has the right, and exercises the right to go in there and slash the rate to zero, as the lower limit, then the birch rod might be in the closet, but the municipality or those interested in the welfare of the municipality, so far as rates are concerned, would not dare use the birch rod, because they would know that the utility had this unfair competitive device which would be a weapon more formidable than the birch rod; and they would be afraid even to attempt to use their birch rod when threatened with the unfair competition bludgeon.

This bill makes the birch rod effective and destroys the bludgeon. I think that Governor Roosevelt realizes this. The bill makes effective the now impotent birch rod that Mr. Roosevelt speaks of in his speech.

When regulation has failed and, after a referendum, the public demand relief under their undeniable right to go in and operate their own system, it should be under fair competition.

Mr. HOCH. I should like to ask a question, Mr. Chairman. Mr. Williams, you referred to a Georgia case. Was any effort made in Georgia to pass an antidiscrimination law, or was any effort made

to give the State commission the power to fix minimum rates in order to meet the situation you referred to?

Mr. WILLIAMS. I am afraid I did not quite understand all of that. You say was there any effort——

Mr. HOCH. Did the State of Georgia do anything to reach the abuse to which you referred in Crisp County? Does the State of Georgia have an antidiscrimination law to prevent the sale of power at a less rate in one place than in another, difference in cost considered?

Mr. WILLIAMS. No, sir.

Mr. HOCH. Was any effort made to pass some such law?

Mr. WILLIAMS. An effort by the State, you mean—do you mean by the State legislature?

Mr. HOCH. Is there any power in the State of Georgia to correct that abuse?

Mr. WILLIAMS. So far as I know there is not. If these is, it has not been exercised. I thought your question was whether the State made any effort to create such an authority.

Mr. HOCH. Some States do have laws to cover situations of that sort.

Mr. WILLIAMS. Apparently, if they have the power, the commission was ignorant of it, because they acquiesced in the abuse. The matter was appealed to the courts and the Georgia Power Co. asked for an injunction in the first place. In the end the commission took no notice of the abuse.

Mr. HOCH. Are you familiar with the antidiscrimination laws of some of the States, for instance with reference to the sale of gasoline at a lower rate in one community than in another?

Mr. WILLIAMS. Oh, yes. I do not think Georgia has that as applied to electricity.

Mr. HOCH. Is there any reason why that principle can not be applied to the sale of power in a State? Is it within its jurisdiction to enact a law similar to the one you are asking us to enact here?

Mr. WILLIAMS. I think it would be very desirable. What I say is this, as I read it in my general statement, "Congress is the only power able to give relief promptly throughout the territory of the United States. Its example would be a stimulant to State actions in taking jurisdiction in circumstances beyond the power of Congress."

Now, there are a great many cases where it would be really advantageous to have both a Federal law and a State law.

Mr. HOCH. What I am asking is why the States do not exhaust their power to reach this problem before asking the Federal Government to step in? Was there any public sentiment in Georgia for this kind of legislation?

Mr. WILLIAMS. If I was a State and had the right to pass such a statute, knowing about the situation as I do, I would not hesitate a minute to do so. But whether anybody has ever attempted that, I do not know.

Mr. HOCH. Mr. Williams, my questions are not in any sense antagonistic. You stated what seemed to be a very glaring case of injustice to the county of Crisp in Georgia. The point I am making is this: Was the public sentiment of the State concerned

with that abuse sufficiently to demand of its legislature to try to do something to reach it? If not, why not?

Mr. WILLIAMS. As a matter of fact, I was down there in Crisp County and my idea at first to cure this, before I discussed it with some of the people, was simply to come before the Federal Trade Commission. I tried to get those people to sign a petition to the Federal Trade Commission asking for relief from that sort of unfair competitive methods on the ground that it prejudicially affected interstate commerce, and so forth.

We had the entire sympathy of the board, but, apparently, they were afraid to take any initiative in the matter. I mean by that, they were timid about it. They were getting temporary credit at the banks, and they frankly said, that is, some of the members said to me, thaat they were afraid, if they did, the banks would cut off their credit and throw them into bankruptcy.

Mr. HOCH. Do you think the States have power in this case that they have not exercised?

Mr. WILLIAMS. I think that some of the power contemplated in here the State could take jurisdiction over and have the power to correct; yes, I do. I think some of the abuses coming out of this would probably come under the jurisdiction of the Federal Government. Of course, the Georgia commission at the present time has held that they have no such power, that they have not anything to do with it.

Mr. HOCH. Do you mean they have held that the State would have no power; or simply that the legislature has not passed an act in exercise of the power?

Mr. WILLIAMS. That is it, the latter. Of course, the very fact that the State had not taken any action, is evidence, to my mind, there is no reason why it could not be effected much more quickly and more efficiently by the Federal Government in most of the points so far as a remedy is concerned. These are reasons why I would advocate the Federal Government taking jurisdiction.

Mr. SHALLENBERGER. The fact that some of the greatest offenders along this line are interstate corporations, operating in States outside of the one where they are applying this pressure, is one reason why the Federal power is needed to reach them; is not that correct?

Mr. WILLIAMS. As a matter of fact all of them that I know of, who in my opinion would take that sort of action, are interstate companies.

Mr. SHALLENBERGER. I know that in Nebraska we have a law similar to the one Mr. Hoch has referred to, and we could reach this abuse perhaps in many cases by State action. But I think there might be cases where we would require Federal authority.

Mr. WILLIAMS. Yes. Take this very company in Georgia. Of course, they are buying and selling and transmitting across State lines.

Mr. BURTNESS. It is not a question as to whether the company sells in any particular State, is it? It is a question whether the business that is actually being conducted at that particular place is interstate in its nature or intrastate. For instance, in this glaring case to which you have referred, was that actually an interstate transaction or was it an intrastate transaction?

Mr. WILLIAMS. I think for taxing purposes, for instance, the State would have a perfect right to tax the gross sales; in that sense it would be intrastate business; that is, where it was retail distribution.

Mr. BURTNESS. Where is the power produced in this particular case in Georgia?

Mr. WILLIAMS. Why, nobody knows; all over the country. Nobody could tell that.

The CHAIRMAN. Why couldn't they?

Mr. WILLIAMS. Well, because you just have an impossible, intricate problem to determine the flow of current; that is, to determine where current at any particular point came from. It is an interconnected system and there are so many generating or producing points.

Mr. BURTNESS. In various States?

Mr. WILLIAMS. Yes, sir.

Mr. BECK. Isn't it quite clear in the case to which you referred in Crisp County, whether or not the electrical energy comes across State lines or is generated within the State?

Mr. WILLIAMS. I do not think so, sir.

Mr. BECK. You do not think so?

Mr. WILLIAMS. No, sir.

Mr. BECK. Do you mean to say upon inquiry it could not be ascertained whether the consumers in Crisp County get electricity generated within the borders of Georgia or whether they get their electrical energy from some power plant in another State?

The CHAIRMAN. Is it not true that this company that furnishes this power down there is a company that covers three or four States?

Mr. WILLIAMS. Yes, sir. I was just going to say this. One day it would come from Alabama and the next day it might come from North Carolina. The next day it might be right in the State of Georgia. In other words, it is shifting all the time, depending on load centers and dispatchers' orders, and so on. In other words, you might as well ask me whether a train that pulls up in the Union Station was made up locally, out here in Maryland, or whether it came from New York. It might have come from New York or it might have come from Chicago; it depends.

Mr. BECK. In determining the domain of Federal power, there has never been any difficulty on the part of the courts in determining whether the train is operating interstate or whether it is operating intrastate.

Mr. WILLIAMS. No; because it is easier to tell that as to trains. The point I am making is—I probably did not make it clear—as a matter of fact trains would be coming from several States and at different times and it would depend on which train you were talking about and which particular time on the schedule. I just gave that as an illustrative analogy as to the various sources.

Mr. BURTNESS. In any event it is your contention that under the facts here, some of the power sold in Crisp County, Ga., was generated in other States?

Mr. WILLIAMS. There is no question about that, sir.

Mr. BURTNESS. So that would make it an interstate or a Federal problem?

Mr. WILLIAMS. Yes; a part of the time. In other words, the Georgia Power Co. is generating far below the amount of current

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that they are using on their interconnected network system and on that interconnected network system there are embraced generating points outside the State. It would be a pretty complicated sort of metering problem.

Mr. BURTNESS. They do generate some power in Georgia?

Mr. WILLIAMS. Yes; surely.

Mr. BURTNESS. But they sell energy in Georgia generated elsewhere, as well?

Mr. WILLIAMS. Yes; in other words, it is commingled.

Mr. COOPER. Mr. Williams, do you know how far electrical energy can be transmitted from the place it is generated to the consumption point? How far can it be carried?

Mr. WILLIAMS. It depends on your viewpoint, on how you define "transmitted." By relaying it, through what people ordinarily call superpower zones, you could transmit it almost an indefinite distance; around the world, to any point that is connected on the system. You generate at one point and you transmit to another point and then at that point you have some more generating stations and you transmit it on further.

Mr. COOPER. Of course, there are what they call booster stations?

Mr. WILLIAMS. Yes.

Mr. COOPER. There is one central point of generation?

Mr. WILLIAMS. Yes.

Mr. COOPER. I had heard that it is pretty difficult to carry it over a hundred miles. Perhaps I am mistaken about that.

Mr. WILLIAMS. They have direct lines, I think there are some direct lines around 250 miles, straight direct lines, high-tension lines.

Mr. COOPER. Straight direct lines of 250 miles?

Mr. WILLIAMS. I do not mean by straight that they would not vary, but without any intermediate stations along the way. In other words, the actual capacity due to the particular set-up would be known to be carried 250 miles.

Mr. NELSON. I should like to ask a question, Mr. Chairman. Mr. Williams, I did not understand your reply to Congressman Hoch. Why do you not go to the legislature of the State of Georgia for the remedy you are seeking? Why do you come here?

Mr. WILLIAMS. I think that the proposition in the first place is a general national problem and it concerns companies who operate in several States.

Mr. NELSON. Are you interested in the national situation primarily or in this particular Georgia situation?

Mr. WILLIAMS. I am interested primarily in the national situation.

Mr. NELSON. Rather than in the particular situation in Georgia?

Mr. WILLIAMS. Rather than in the particular situation that I gave as an example.

Mr. NELSON. Why do you not go to Georgia and try to get a proper State law which the other States may adopt? Why do you not go to the legislature of the State of Georgia and try to get passed by them a proper law that would cure this situation and then the other States could adopt that law? Why ask the Federal Government to do everything?

Mr. WILLIAMS. I just tried to answer that. I simply said that, in my opinion, it is a national problem, not just a State problem.

It is a problem concerned with companies that are interstate companies. That is my reason.

Mr. NELSON. What effort was made in the Georgia Legislature to cure this evil?

Mr. WILLIAMS. I do not know that any serious effort was made.

Mr. NELSON. Where else in the United States do you know of a similar situation? Do you know of any other particular case?

Mr. WILLIAMS. I do not know of any court case; no.

Mr. NELSON. But, so far as you know, no effort has been made whatever in the State of Georgia, where this trouble originated, to cure it there, where the trouble exists?

Mr. WILLIAMS. Of course, the State rate association, you understand, has tried in a great many ways to do something about it to get relief one way or another. But I do not think they have ever been able to make much headway.

Mr. NELSON. Have they gone to the proper source to get relief? Have they gone to the legislature and tried to get their laws amended?

Mr. WILLIAMS. I think they have tried to get a number of laws; of course, not this particular bill, but similar laws for relief, and I think they have been very unsuccessful.

Mr. NELSON. The people of Georgia and the Georgia Legislature will not pass what you think are proper laws?

Mr. WILLIAMS. Well, I do not know.

Mr. NELSON. So you come to Congress and ask it to legislate for Georgia?

Mr. WILLIAMS. Well, you asked me that question before. I suppose you misunderstood me. I said that it was not primarily for the State of Georgia.

Mr. BURTNESS. You are not a resident of Georgia?

Mr. WILLIAMS. No, sir; Misissippi.

Mr. BURTNESS. You were citing the Georgia case merely as an illustration?

Mr. WILLIAMS. Yes, sir.

Mr. GARBER. Mr. Williams, has the language in the proposed amendment to section 20 (*a*) been construed by any of the courts? Especially do I ask this question with reference to this provision which prohibits the sale or offer for sale of electrical energy in one community at a rate or rates higher than the rates at which electrical energy is sold or offered for sale in another community by the seller or a person affiliated with the seller, unless there is a difference in the cost to furnish a like service in the said communities.

Mr. WILLIAMS. What is the question, Mr. Garber?

Mr. GARBER. Take the word "community." Here is a plant in one part of the State and another plant in another part of the State which may be two or three hundred miles away, or four or five hundred miles away. Would that come within the language of this provision as to the meaning of "communities"?

Mr. WILLIAMS. You understand, we have a definition of "communities" here in the bill. On page 5 there is this language:

> (A) The word "community" shall be construed to be any area within which the rates of the seller are the same to all consumers for a like class of electrical service.

Then—

No basis for complaint under this act shall exist because of a difference in rates for like service between two communities separated by a greater distance than 300 miles.

Mr. GARBER. That is the statutory definition?

Mr. WILLIAMS. I do not know that that is the statutory definition.

Mr. GARBER. That becomes the statutory definition?

Mr. WILLIAMS. That is right, sir.

Mr. GARBER. I see; I have not read the bill in its entirety.

Mr. WILLIAMS. The reason we fix it at 300 miles is the same as the answer to the question, How far can you transmit power? It is about the practical limit of transmission from one place to the other.

Mr. GARBER. If this amendment were adopted, to what extent would it increase the powers of the power commission to fix rates that would control the transmission of electrical energy interstate?

Mr. WILLIAMS. I do not think it increases their power, except to extend along the lines already in the present bill. It is certainly implied by the provisions of the bill that they may declare this type of discrimination as unlawful.

Mr. GARBER. That is the main purpose of the amendment?

Mr. WILLIAMS. Yes, sir. Of course, Mr. Drayton and Mr. Ryan for the power commission are both attorneys. I am just a one-horse engineer. They can tell you more about that than I.

Mr. GARBER. Well, you seem to be a pretty good horse.

The CHAIRMAN. Have you finished, Mr. Williams?

Mr. WILLIAMS. Yes, sir.

The CHAIRMAN. We will hear Mr. Powelson.

STATEMENT OF W. V. N. POWELSON, CONSULTING ENGINEER, 551 FIFTH AVENUE, NEW YORK CITY

The CHAIRMAN. Will you please give your name, whom your represent, and your connections, Mr. Powelson?

Mr. POWELSON. My name is W. V. N. Powelson. I live in New York City. I am a consulting engineer and have a general interest in the subject-matter of this bill.

Mr. NELSON. Whom do you represent?

Mr. POWELSON. I represent myself, sir.

Mr. GARBER. Did you say that you were a practicing attorney in New York City?

Mr. POWELSON. A consulting engineer in New York. I am interested in this question of providing proper protection for municipalities who feel that they should undertake the building of a municipal plant.

The CHAIRMAN. You may proceed.

Mr. POWELSON. I was going to direct my remarks to some analysis of some of the provisions of the bill.

Mr. NELSON. You are familiar with municipal plants throughout the country?

Mr. POWELSON. Yes, sir; in a general way.

Mr. NELSON. In how many cases would you say that this situation in Georgia, that has been described, would be duplicated to-day?

Mr. POWELSON. I could not answer that question, but I do know that that has not been the only case in the United States, and I think if the same situation were created almost anywhere else, possibly the very same methods would be used.

Mr. NELSON. Then your concern is of what might happen rather than what is going on to-day?

Mr. POWELSON. My fear is directed to what could happen particularly in the financing of a municipal enterprise. If a municipality wants to get some money, the bankers will want to know what is going to happen to the municipality if they put up the money; are they going to have to compete against a rate under which they could not possibly live and which is below cost, or are they going to have a fair chance to pay the interest upon the indebtedness which they incurred in building this plant.

Mr. NELSON. In most of the States are not the municipally owned plants doing pretty well and do they not have State laws to protect them?

Mr. POWELSON. There are a great many municipal plants which operate as a monopoly in their municipal territory and I think they do very well. But let us take a municipal plant that is to be erected in a territory in which there is already an outstanding franchise.

Mr. NELSON. But it is true, is it not, that it is a very small percentage of those municipal plants that could be threatened by competition where the power was interstate?

Mr. POWELSON. If a municipal plant is operating without competition of a privately owned electric utility, it is inconceivable almost that they would grant a franchise to somebody to come in and compete with them. This bill is directed more for the protection of new municipal plants.

Mr. NELSON. Yes; but this bill would only apply to those plants that were concerned with the transmission of electric energy in interstate commerce; interstate transmission.

Mr. POWELSON. No. This applies to two classes. It applies to licensees under the Federal Power Act and to interstate companies. I think these are the only two over which the Congress can take jurisdiction.

Mr. LEA. Do I understand that the theory is that the licensee will be subject to Federal regulation, even though he is performing a service not connected with interstate commerce?

Mr. POWELSON. I would rather have the lawyer's answer that. I am not a lawyer. Mr. Drayton is here. I think he could answer that question. I do not like to get off on legal subjects, because I am not competent to discuss them.

Mr. LEA. We can wait, then.

Mr. POWELSON. When a practice is evil and a resolution has been taken to render its exercise impracticable it is prudent and necessary to consider whether the proposed legislation would permit to be done effectively by indirection and contrary to the purposes of the legislation that which may be done directly only when the doer subjects himself to the regulation provided in the legislation.

Paragraph (5) of section 1 of the bill is directed to imposing limitations upon the sale or lease of electric property in order to prevent it being used by indirection and contrary to the purposes of

the bill, to carry on an unfair competition which the seller or lessees could carry on directly only if it should be willing to subject itself to the regulatory provisions of the bill.

I may interpolate there that the bill does not forbid the doing of certain acts. It is optional with the doer to do them or not, as he sees fit. But if he should resort to this practice which Mr. Williams has described as having occurred in Cordele, Ga., he would then subject himself to the regulations of this bill.

Mr. GARBER. In doing so, would he file his complaint, or would a complaint be filed with the power commission and would the power commission then determine whether or not the rate was reasonable or discriminatory or unjust?

Mr. POWELSON. No, sir. What the commission has to decide, if a complaint is made, are two things: One, is there a difference in the rate between two different communities, and does the difference exceed the percentage difference in cost between the two communities? That is the first thing that they would have to decide.

The second thing they would have to decide would be whether in the community having the lower rate, the private utility was experiencing the competition of a municipal enterprise. Now, if it was experiencing the competition of a municipal enterprise, and that enterprise was making rates so low that in order to balance the budget they had to resort to the taxing power, then the rates in that community are out of consideration under this bill. In other words, that a private utility is not to be penalized if it is subjected to an unfair municipal competition; that is, if the municipality is making up its electric system expenses by taxing its people.

Mr. GARBER. The power commission determines those questions, does it not?

Mr. POWELSON. Yes, sir.

Mr. GARBER. As to whether or not a rate is discriminatory or unjust or unreasonable?

Mr. POWELSON. Yes, it has that power here.

Mr. GARBER. Well, it would have under this amendment.

Mr. POWELSON. Yes. So far as the interstate companies are concerned I think that is the only—well, I am getting on a law point again.

Mr. GARBER. So that wherever a community operated a municipal plant intrastate, and were doing so at a rate which the power commission might determine to be discriminatory or too low, then that community, although it was entirely intrastate, would be controlled by the power commission to the extent that it would not be permitted to continue to produce at that lower rate; is that correct?

Mr. POWELSON. No; I could not agree with that, sir. I think that the bill as drawn provides that where it is an interstate company, I should think that it would have to shown that there was an undue burden on interstate commerce. But I am really not competent to discuss those legal matters. I would prefer that Mr. Drayton answer those questions.

Mr. GARBER. I had in mind this provision of the power act. This is section 20:

> The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

So that whenever a local rate becomes a burden on interstate commerce, the commission assumes jurisdiction.

Now, my question was, although very crudely framed, whether or not that same principle would apply under this amendment.

Mr. POWELSON. I should think it would, but as I say, I would prefer to have the lawyers answer that.

Mr. DRAYTON. You have in mind, Mr. Garber, the Shreveport principle, the principle in the Shreveport case?

Mr. GARBER. Yes.

Mr. DRAYTON. We will discuss that.

Mr. COOPER. This legislation does not apply only to electrical energy as developed by water power?

Mr. POWELSON. No, sir.

Mr. COOPER. It applies to all electrical energy whether developed by steam or water; is that right?

Mr. POWELSON. Yes, sir.

Mr. NELSON. Aside from the technicalities of this, there is no question but that the laws of Georgia could have been so altered as to cure that evil that you have described. The Public Utilities Commission of Georgia would have charge of all the rates in that State. But if you pass this law, you would have the Public Utilities Commission of Georgia passing on rates in general in the State of Georgia and you would have the Federal Power Commission coming in under certain contingencies and passing on other rates. In other words, you would have two rate-making bodies for the State of Georgia.

Mr. POWELSON. No, sir; I think it is very clearly otherwise.

Mr. NELSON. You would, if they depended on this law, because the Federal Power Commission determines what the rate should be.

Mr. POWELSON. No. The Federal Power Commission has the right to remedy the unlawful rate, if it is unlawful.

Mr. NELSON. And to prescribe the rate or rates thereafter to be charged?

Mr. POWELSON. Yes.

Mr. NELSON. Then you have two rate-making bodies for the State of Georgia?

Mr. POWELSON. No. If one community is too much higher than the other, I think the power commission under this law would have the right to say that that higher rate was unlawful and would have to be reduced down to a point where it represented only the difference in cost as between those two communities.

Mr. NELSON (reading):

> In any such case the commission shall have power to prescribe the rate or rates thereafter to be charged in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination.

If that is true, you would have two rate-making bodies for the State of Georgia.

Mr. POWELSON. If you read the first part of the bill, it is made applicable to a licensee without qualifications and it was made applicable to interstate companies under the usual language of regulation by the Interstate Commerce Commission. So that if in Georgia,

for instance, using that State as an illustration, the rates were so low, and the energy was sold below cost, we will say, in a certain part of the State, and that should tend to prejudicially affect rates which were charged over in some other State for electricity sent out of the State of Georgia, I think the Federal Power Commission would have jurisdiction over that situation, just as the Interstate Commerce Commission has over the railroads.

But I am getting over my head in discussing these legal matters. I am doing the best I can.

Mr. DRAYTON. Mr. Chairman, since we are on that point, may I answer that question?

The CHAIRMAN. Yes.

Mr. DRAYTON. The principle of the Shreveport case, which applied in connection with the rates prescribed in the State of Texas by the Texas Railroad Commission and which were complained of by Shreveport, La., 40 miles over the border from Texas, is exactly the principle that we want to invoke here. It applies to electric energy, it is true, as against the transportation of freight and passengers. But that is the identical principle here.

Now, there would not be any concurrent regulation of the rates in the State of Georgia. That does not happen where the Shreveport principle is invoked before the Interstate Commerce Commission. The Interstate Commerce Commission, as you will remember in that case, prescribed a reasonable level of interstate rates from Shreveport into these Texas points.

Mr. NELSON. But we are not talking about interstate rates. We only speak of the interstate phase of it as a reason for the legislation. But if this electricity gets into the State of Georgia and is distributed, the Georgia Public Utilities Commission has supervision over the rates, does it not?

Mr. DRAYTON. Yes; over the intrastate rates.

Mr. NELSON. We do not care very much where this current comes from. If the Georgia Public Utilities Commission has charge of all of these rates that we are considering wherever it is distributed in the State of Georgia, what difference does it make where it comes from?

Mr. DRAYTON. Do you not see that over in Alabama, just over the line, you may have a different level of rates? I am directing myself now to the interstate character of this transaction and the burden on interstate commerce. They have this level of rates. The Georgia commission might, in answer to the complaint of a place like Cordele, fix a level of rates there that produced discrimination against these Alabama points. They might desire, right over the border, to locate industrial plants and the rate on electric power might be a very important consideration as to the location of those plants.

Mr. NELSON. Just a minute; that is all hypothetical. We have got a real case. Here is a certain trouble in Georgia. You have stated the nature of it. There is no reason why proper laws can not be passed in Georgia that would give the Public Utilities Commission of Georgia authority to straighten that out, is there?

Mr. DRAYTON. Not a bit, if they are willing to do it.

Mr. NELSON. That is what I want to know.

Mr. DRAYTON. All right.

Mr. NELSON. Now, let me go a little further. The Public Utilities Commission of Georgia has absolute jurisdiction over the fixing of rates in Georgia?

Mr. DRAYTON. They might have.

Mr. NELSON. Now, if this law passes and a contingency arises under which the matter is taken to your commission, then your commission steps in and under that paragraph of the bill, fixes certain rates in the State of Georgia, does it not?

Mr. DRAYTON. They fix a level of maximum reasonable rates.

Mr. NELSON. Yes; but what is the need of it, if they can cure their own trouble in Georgia?

Mr. DRAYTON. Well, that is what I want to tell you. Assume that your Georgia commission has a complaint before it directed to this very situation at Cordele. They say, under a statute similar to this—and that would be the only effective remedy, in our opinion, that all the rates in the surrounding territory in Georgia, the intrastate rates, or as affecting interstate commerce in this matter—shall be reduced to a common level and those rates become lower than the rates right over the line in Alabama.

Mr. NELSON. But the trouble that we are having, the trouble that we are trying to cure is not the lowering of rates over the State. It is only the lowering of the rates in one community here or there. There is not a general complaint throughout the country that these interstate companies are lowering rates, is there? The complaint is that they are trying to put them up.

Mr. DRAYTON. Oh, no; there is no complaint about that. But after all, those rates, under this bill and in practical effect, are governed by what may be done in a given community under the circumstances of this particular case.

Mr. NELSON. Do you claim that the contingency you are bringing up now is the reason why this bill should be passed, or the other case that they have cited, that was cited by the gentleman who preceded you?

Mr. DRAYTON. I certainly do claim that that is a very important reason why you should pass the bill.

Mr. NELSON. Which is more important, the case which you suggest now, that the rates in the State may affect interstate rates, or the intrastate situation that we have had before us?

Mr. DRAYTON. Well, I think both. But I think right now we are directing our attention to the interstate phases of this thing.

Mr. NELSON. That is the one that interests you?

Mr. DRAYTON. Yes.

Mr. GARBER. This, in effect, eventually would extend the power of the Federal Power Commission to include all intrastate plants, would it not? And they would have to obtain a license from the Federal Power Commission and operate under its jurisdiction eventually?

Mr. DRAYTON. I do not think that follows, Judge Garber, any more than the Interstate Commerce Commission, under that ruling of the Supreme Court, has preempted the field for the several State commissions.

Mr. GARBER. The Interstate Commerce Commission assumes and exercises jurisdiction over more than 90 per cent of the traffic.

Mr. DRAYTON. But there must be a finding; in other words, that is simply because most of the traffic is interstate.

Mr. GARBER. It is very easy to exercise discretionary power and find, however remotely, that an intrastate plant becomes a burden upon interstate commerce.

Mr. DRAYTON. Well, it not only becomes a burden on interstate commerce to the extent that its rates at one point are lower than the general level but, as I say, it might mean the location of plants right over the border, in one State, just like in the Shreveport case, as against another. That draws away prospective locations of industries, and ought to be cured and can only be cured by legislation by the Federal Government.

Mr. GARBER. And by this process the power of the State is gradually centered here in the Capital, where the commission is located.

Mr. DRAYTON. I do not believe that we are responsible for that tendency, Judge Garber. It has already gone far. Of course, if you gentlemen do not consider this is essential, you will not pass it. We are directing our argument to you to try to show you that it ought to pass, that it is the only effective remedy generally for the country. I can not see, under the restrictions imposed here for the protection of private corporations, how it will do anybody any harm to have a general, reasonable, nondiscriminatory level of rates.

Mr. HUDDLESTON. How can the Georgia Utility Commission control the rates that are involved in the use of power generated in Alabama and which flows across the State line and is actually used in Crisp County?

Mr. DRAYTON. I do not think it could, sir.

Mr. HUDDLESTON. Now, if that is what is actually happening then the State of Georgia could not confer upon the utility commission power to regulate those rates.

Mr. DRAYTON. That is the situation.

Mr. HOCH. Do you think the State commissions have power over wholesale contracts?

Mr. DRAYTON. I think they would under the Supreme Court's decision. I have a case on that particular point, and when it comes my turn to make the argument I will go into that phase of it.

The CHAIRMAN. The Shreveport rate case did not cover the question of fixing interstate rates but of vetoing intrastate rates.

Mr. DRAYTON. However, it fixed a reasonable level of rates from Shreveport.

The CHAIRMAN. The case arose, not on account of fixing interstate rates but on account of the Texas Commission fixing intrastate rates that gave advantage to Texas jobbers into Shreveport——

Mr. DRAYTON. That is right.

The CHAIRMAN. It was not so much a question of passing upon interstate rates as it was of vetoing the intrastate rates.

Mr. DRAYTON. Yes, but it was necessary to fix a reasonable level of interstate rates from Shreveport into Texas to which the intrastate rates in Texas should conform to the extent necessary to avoid discrimination.

Mr. POWELSON. Paragraph (5) of section 10, contains certain limitations upon the power to make sales or leases of property.

When a sale or lease is made of property to some party legally outside of the selling or leasing group and ostensibly independent

thereof, the independence should be so complete that neither purchaser nor lessee could be used to perform, in the interest of the seller or lessor, an act constituting an unfair competition.

If the private electric utility is restrained in respect of a sale or lease of property, as provided in subdivision (5) there will remain to it but two alternatives, either to abandon a purpose to destroy municipal credit by a slashing of rates, or to slash all of its rates everywhere to the level required by the terms of the bill.

The section also provides that in order that a municipal corporation shall have a fair opportunity to reach a condition of efficient operation and to supply an electric load of reasonable proportions, the bill provides in subdivision (3) that the municipal corporation shall have 18 months of operation before the commission may determine whether or not its rates are sufficient to fully reimburse it for its "cost" as defined in subdivision (7), paragraph (C), of the bill. Obviously, a municipal rate schedule substantially higher than that of the private electric utility might produce a loss in the early months of a new municipal operation.

Yet such higher rate schedules could not be necessary in order to protect the private electric utility from an unfair municipal competition. The purpose of subdivision (3) and subdivision (7), paragraph (C), of the bill is to give the private electric utility protection against an unfair competition initiated by a municipality. It is wholly consistent with this purpose to give a municipality 18 months within which to demonstrate that its rate schedule will fully reimburse it for its "costs" as defined in subdivision (7), paragraph (C) of the bill.

The large private electric utility serving a growing market is able to do it, with due regard for the public requirements, by providing itself with an electric property which is normally loaded to not less than 90 per cent of its capacity, and in which not more than 10 per cent of its capacity is held for additional consumers. Subdivision (7), paragraph (C), of the bill, which, when read in connection with subdivision (3) of the bill, constitutes the protection afforded a private electric utility against an unfair competition by a municipality, provides, in effect, that for the purpose of determining whether the municipal rates constitute an unfair competition by the municipality the municipality shall be placed on an equality with the large private electric utility in the sense that it shall not be required to show a profit, except upon that part of its invesment in plant, equipment, and machinery of a capacity corresponding to its delivery of electrical energy plus 10 per cent thereof as an amount held in reserve for prompt service to future consumers.

If the municipality for reasons of its own—perhaps to have at hand extra facilities to promptly serve new consumers who may be attracted to its territory by its rate schedule—should see fit to install plant, equipment, and machinery having a capacity two or three times greater than that corresponding to the lode which it expects to serve during the first 18 months of operation of its property that would have no bearing upon the question of the fairness or unfairness of its rates in a competition with a large private electric utility. If any large private electric utility operating in a large monopolistic territory should possess plant, equipment, and machinery having a capacity two or three times that corresponding to the load which it

is serving, it costs in connection with all but a small part of that extra investment ought not to be allowed by the State regulatory agency in fixing a reasonable maximum rate.

Yet such an extra investment would not be forbidden to the private electric utility. Why then should any such extra investment by a municipality be considered in determining the fairness of rates made by it in a competition with a private electric utility? All that should be considered in that connection is whether the municipal rates are sufficent to support an investment corresponding to the municipal load served, plus a reasonable additional investment made in order to be ready to take on promptly a reasonable additional service. The provisions of subdivision (3) and of subdivision (7), paragraph (C), are fair and afford the private electric utility a reasonable and substantial protection against an unfair municipal competition.

The bill is fair. It does not on the one hand take from the large private electric utility the power to unfairly compete with a municipal corporation and on the other hand give to the municipality the power to compete unfairly with the large private electric utility. The unfair competitive practice complained of can only attain its object when the local losses incident to its use may be compensated for by income from other sources. In the case of the large private electric utilities the compensation is always derived from the enjoyment of maximum electric rates elsewhere. This compensation, due to the limited scope of its operations, is denied the municipal corporation but it is conceivable that the municipal corporation may make up its losses resulting from an unfair competition initiated by it by its power to tax its citizens.

The bill specifically provides in subdivision (3) of the first section that no municipality shall derive any protection under it which sells electric energy at rates determined by the commisison to be so insufficient that recourse must be had to taxation to recoup the loss. The bill goes further when it denies any protection under it to a municipality which sells electric energy at prices insufficient to yield to the municipality, in respect of that part of its municipal property used, as described in subdivision (7), paragraph (C), to deliver its electric service, a net profit after deducting from the gross receipts all expenses of operation and maintenance, the interest on the capital invested, and a sum for expected depreciation sufficient to replace the several parts and elements of its said electric property at the expiration of their respective lives.

And it goes still further by providing that the minimum net profit which must be earned by a municipality if protection, under the bill, is to be afforded to it shall be equal to the taxes which would be assessed against the said municipal electric property if it were privately owned.

If the bill is not enacted into law the large private utilities will be left in possession of a weapon of ruthless destruction which the public interest requires must be taken away. If the bill is enacted into law neither private electric utilities nor municipal corporations will find it to their advantage to engage in unfair competition one with the other.

The bill does not give to the commission the power to fix minimum rates. No additional powers are granted to the commisison to fix

rates. Its power to fix rates remains as it is now. But what the bill does is to declare unlawful a certain system of rates, as described in the bill; and to confer jurisdiction upon the commission to act to remove the unlawful element.

There is nothing unfair to any electric utility in the bill. It does not require that rates shall differ in different communities according to the difference in cost to deliver the respective services. At the will of the private electric utility the rates may be uniform; and at the maximum allowed by the State regulatory agency in all communities served by it. But when a large private electric utility undertakes to destroy a municipal electric undertaking by the method used against the county of Crisp, Ga., the bill would require the private electric utility to make such rearrangement of its rates that they could not in the community having the higher rates exceed the rates in the community having lower rates by a greater percentage than the percentage difference in cost to deliver the service in the two communities; but this latter limitation is itself subject to the limitation that it shall not apply if, in the community in which it may have been made lower rates, the private electric utility is experiencing a muncipal competition of a character which is, in effect, declared unfair by the terms of the bill.

What the bill does, while not forbidding the practice, is to make it too expensive for any private electric utility to find it to its advantage to use an unfair competitive practice of the type which has always been used by unrestrained monopoly to preserve its monopoly—the type of unfair competition which was associated years ago with the name Standard Oil.

The bill is not a grant of privilege to encourage the development of municipal electric enterprises; but when people organized into municipal corporations have come to the conclusion, as the result of a referendum, that in no other way, except by municipal ownership and operation, can they escape from exorbitantly high electric rates, based upon inflated property valuations, it is a guarantee to them that they may try out their experiment and demonstrate by actual accomplishment what it is capable of doing for them, under rules that are fair and just to them and to private undertakings organized for profit.

No private electric utility which has returned to the State regulatory agency, for rate making purposes, a property valuation free from inflation has anything to fear from the passage of the bill.

Mr. DRAYTON. Shall we continue, Mr. Chairman.

The CHAIRMAN. We have about 15 minutes left this morning.

Mr. DRAYTON. Doctor Smith, I believe, has a statement.

The CHAIRMAN. We will be glad to hear you.

STATEMENT OF GEORGE OTIS SMITH, CHAIRMAN FEDERAL POWER COMMISSION, WASHINGTON, D. C.

Mr. SMITH. I have just this to say, Mr. Chairman and gentlemen of the committee, that, as set forth in the report to the committee, the Federal Power Commission is in full sympathy with the purposes of this proposed legislation, and I am here simply to indicate that indorsement of the bill.

We have with us also other members of the staff, the general counsel, Mr. Ryan and Mr. Gatchel, who can answer your questions better than I can answer them.

As I see it the primary purpose of the bill is to make effective competition possible in communities where because of inadequate service or excessive rates an additional electric agency is desired; or, on the other hand, in communities where two agencies already exist, then the purpose of this bill is to make competition between the two, fair competition.

The proposed legislation in this way aims to make competition fair, first, by preventing discrimination in rates in different communities in the same region served by the same system, whereby the higher rates charged in most of the communities enables the company to make below-cost rates in the community where there is competition.

In the second place, the bill aims to prescribe uniform accounting whereby the self-supporting character of the municipal plant is assured, thus again preventing below-cost rates in competitive territory.

It seems to me that this call for legislation is simply another expression of the long recognized need for restriction of cutthroat trade wars where the chief weapons used are these below-cost rates, or prices below cost, and therefore excessively low prices, the pretense for which is competition, whereas the real purpose of it is monopoly. The commission believes the bill provides for the electric industry a practical way of stopping both unfair competition in one community and unfair discrimination in rates for adjoining or neighboring communities.

Rates, as provided here, must be based upon actual, reasonable costs, and if so based I believe we must recognize they are fair to all interests. But rates that disregard such costs, whether they are excessively high or excessively low, may be expected to work injustice somewhere. Experience has shown this, and I believe it is this kind of experience that has led to the introduction of this proposed legislation that is before us now.

One of the questions that was raised touches upon the reason why this legislation should be in the form of an amendment to the Federal water power act. I think this course is natural because the general attitude of Congress in connection with the Federal water power act has been to regulate intrastate business where there was either no State agency or a State agency with inadequate authority; and in the second place, of course, to regulate interstate business where State agencies could not have the necessary authority. In other words, the general purpose of the Federal water power act was to provide regulation that would supplement and complement State legislation. So it is rather natural, when or where there is trouble to come to Congress and ask for amendments to the Federal water power act that would thus be made adequate to provide the remedy.

The CHAIRMAN. Any questions?

Mr. GARBER. I have a question or two, Mr. Chairman.

The CHAIRMAN. Mr. Garber.

Mr. GARBER. Has the Federal Power Commission requested this legislation?

Mr. SMITH. No, sir.

Mr. GARBER. Have they approved it?

Mr. SMITH. They have endorsed it as to its general purpose, but not discussed in particular the various questions that may arise in the detailed consideration of the paragraphs and sections, and our general counsel is here to reply to any questions that may be asked along that line.

Mr. GARBER. The general counsel for the Federal Power Commission?

Mr. SMITH. Yes, sir.

Mr. HOCH. Under the present law the commission has no jurisdiction over power companies except water power companies?

Mr. SMITH. Licensed water power companies.

Mr. HOCH. Yes. Now, this proposed legislation extends certain jurisdiction over power companies regardless of how the power is generated?

Mr. SMITH. I think that this committee must specifically consider that phase in extending the jurisdiction of the Federal Power Commission; you have got soon to face that general proposition; it presents the situation that must be met of large areas extending across State boundaries, served by companies that transmit and distribute electricity which comes from both steam plants and hydro plants, and comes from both licensed hydro plants and unlicensed plants.

Mr. HOCH. But you assert no jurisdiction over those companies except in this one particular.

Mr. SMITH. That is the purpose of this amendment.

Mr. HOCH. So however desirable this legislation might be it is in a way piecemeal legislation.

Mr. SMITH. Yes; that is, of course, true; and that is true with much of our legislation that is enacted.

Mr. HOCH. I have in mind the broad question whether the commission should be given power over all power companies, doing interstate business or whether we should simply take up one phase of its activity, as proposed here.

Mr. SMITH. That is why I made this statement that you must find the general purpose of it if there is to be, as some believe, adequate coverage of all territory affected by electric service.

Mr. SHALLENBERGER. And also to control the rates——

Mr. SMITH (continuing). Only in this particular line where there is a discrimination between the rates.

Mr. SHALLENBERGER. Where there is discrimination.

Mr. SMITH. Yes.

Mr. HUDDLESTON. As I understood you to state a moment ago the commission has no jurisdiction over hydroelectric plants unless they are licensed.

Mr. SMITH. Yes.

Mr. HUDDLESTON. The power granted by the commission to them.

Mr. SMITH. That is right, or in cases where they are customers of licensed power plants.

Mr. HUDDLESTON. Yes. There are many cases of hydroelectric plants where you have nothing to do with their activities.

Mr. SMITH. We have nothing at the present time.

Mr. HUDDLESTON. This bill does not give you any right to fix rates in any event?

Mr. SMITH. Well, of course we have that right only as to interstate, or licensees.

Mr. HUDDLESTON. Or licensees.

Mr. SMITH. Yes.

Mr. HUDDLESTON. But this gives you no power to regulate all rates. We do not confer in this bill the power to regulate rates.

Mr. SMITH. We would have the power to prevent discrimination.

Mr. HUDDLESTON. Merely the power to prevent discrimination.

Mr. SMITH. I think, to use a phrase that has already been used here, that this bill would be a birch rod.

Mr. HUDDLESTON. The thought I have in mind is this: The bill seems very complex to me in its provisions for doing what has been indicated as being desired, and I am wondering whether the commission has considered the verbiage of the bill for attaining that particular purpose.

Mr. SMITH. As the chairman knows, both early last summer and recently the commission has given consideration to this bill and the corresponding bill that has been introduced in the Senate, and we have twice reported on it, but not, as your inquiry is directed; we have not reported on the detailed mechanics used in carrying out the purpose.

Mr. HUDDLESTON. Are any bills pending which would extend the commission's power of regulating interstate rates?

Mr. SMITH. I do not think of any that are pending. Of course, the commission, in its recent annual report, has made certain general recommendation in one or two particular details.

Mr. HUDDLESTON. May I ask what is the attitude of the commission towards such an amendment?

Mr. SMITH. The attitude of the commission, as I know it, is decidedly in favor of strengthening the present Federal water power act so that it will completely cover the regulatory field not covered by the State commissions.

Mr. HUDDLESTON. In other words, to give you the power to regulate all interstate rates.

Mr. SMITH. Yes, exclusively; and also to supplement in the matter of intrastate rates where there is no State regulation. Also, simply to illustrate one phase of the subject, we have authority under section 19 of the act, on issue of securities, and that has been receiving our attention for a considerable time in recent months. In fact we have just spent two days in such a case, because the State commission had no authority. And I cite that to mention the fact that this lack exists in about half of the States where there is not given to any State agency authority over the issuing of the securities of the power companies; and of course our jurisdiction, even in those States lacking State regulatory authority is limited to licensees, affiliated companies, and customers of licensed companies.

Mr. SHALLENBERGER. Mr. Commissioner, the matter which you have just discussed was one of the reasons for the introduction of this legislation, to cover what is not now covered by legislation.

Mr. SMITH. I think in the particular case that has been mentioned, that the people of Crisp County seem to be powerless to protect themselves against competition that they consider unfair. Now as to the general extent of such cases I can not state definitely. I know that the complaint is rather general that there are these cases of unfair competition, but it is not a matter that I have looked into particularly.

Mr. BULWINKLE. Do you know how many complaints you have received?

Mr. SMITH. We have not received these complaints, but I mean the general complaints that we read of in the journals and the newspapers.

Mr. BULWINKLE. Have you any idea at all as to the number of cases bearing directly on that point that complaints have been made?

Mr. SMITH. Well, I might say, or I meant to say, that I do not know directly of the matter because they have not been brought to us, because at the present time that is not under our jurisdiction, but I know there is that general complaint. My belief is that there would not be a great amount of work involved, additional work, by reason of the fact that I think that such legislation would prevent it.

Mr. Chairman, our general counsel is here.

The CHAIRMAN. Have you finished with your statement?

Mr. SMITH. Yes.

The CHAIRMAN. We will be glad to go along with the hearing to-morrow.

Mr. PARKER. Do you not think that legislation of this kind would eventually put you where the Interstate Commerce Commision is with regard to the railroad rates—in the final analysis, is that not what will happen?

Mr. SMITH. I would not say that by the nature of the business of distributing electricity would bring the regulation and control of rates under a Federal commision to the same extent.

Mr. PARKER. Well, to a very large extent; not 90 per cent, but perhaps 75 per cent, if you coordinated these various agencies which is going to be necessary to get them functioning properly, you must have it under some commission here in Washington.

Mr. SMITH. I am thinking of the present condition of separating hydro and steam power plants where the electricity flows over the same line as showing that need.

Mr. PARKER. With the coordination of all these methods of generating electricity in the different States and the questions coming before the commission it will ultimately result in the same method or manner that is used in regulating rates on railroads.

Mr. SMITH. Of course, but again I would have to fall back on the lawyers to decide that question; I am not a lawyer, and I am only presenting the practical side.

Mr. PARKER. I am not a lawyer, either; I am thinking of its natural sequences.

Mr. SMITH. There is no one that is going to be harmed if they have been complying with the purpose of regulation.

Mr. BURTNESS. May I not suggest, Mr. Parker, that the matter about which you comment was involved in the bills by you in the last Congress for the reorganization of the Federal Power Commission, and on which we had full hearings, but we finally decided to report on minor changes in the law resulting in the present commission but without adding particularly to the powers of the commission as formerly organized.

The CHAIRMAN. We will adjourn until 10 o'clock to-morrow.

(Thereupon, at 11.45 a. m., an adjournment was taken until 10 o'clock a. m. of the following day, Wednesday, February 1, 1933.)

159525—33——3

FEDERAL WATER POWER ACT

WEDNESDAY, FEBRUARY 1, 1933

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee this day met at 10 o'clock a. m., Hon Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order. Are you ready to proceed?

STATEMENT OF CHARLES D. DRAYTON, INVESTMENT BUILDING, WASHINGTON, D. C., AND MR. WILLIAMS

The CHAIRMAN. Where is the attorney for the power company?

Mr. DRAYTON. I think that he just stepped out in the hall a moment ago, Mr. Chairman.

The CHAIRMAN. Well, tell the gentlemen that if he is going to appear before the committee, we will have to hear him now. We can not wait.

Mr. DRAYTON. Would you like for me to proceed?

The CHAIRMAN. It is perfectly all right. I think that you may go right ahead.

Mr. DRAYTON. I did not know whether you wanted me to proceed now, or hear him first, and then hear me after he had spoken.

The CHAIRMAN. How much time are you going to take?

Mr. DRAYTON. I do not think more than 40 minutes.

The CHAIRMAN. All right. We want to get along. We will hear you, then, Mr. Drayton.

Mr. DRAYTON. My name is Charles D. Drayton, attorney, Washington, D. C. I appear for the proponents of this bill.

Mr. Chairman, Mr. Walton Moore, who was an associate of yours for some years, told a story the other night about a gentleman from Virginia who appeared the first time before the Supreme Court of the United States, a fair jury lawyer, but he had not appeared before that court before. He started out by saying, "I am going to divide my speech, gentlemen, into three parts: First, I will state the facts of this case, then the law, and then I will make a thrust at the passions of this court."

I know that anything that would come under that last head would be futile before this committee. I do not know what the results were before the court.

Mr. Huddleston yesterday asked some questions—I want to take care of just a few preliminary things—suggesting that this bill,

to secure what seemed to be simple results, was, or seemed to be, a very complicated measure.

I want to say, at the outset, that the bill, as it has now been rewritten has not yet, I regret to say, come officially before the committee, because the reprint that Mr. Shallenberger was good enough to ask for yesterday has not come to hand.

(Reprint of the above bill as H. R. 14516 above referred to is as follows:)

[H. R. 14516, Seventy-second Congress, second session]

A BILL To amend the Federal water power act, as amended,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal water power act, as amended, is amended by adding after section 20 a new section as follows:

"SEC. 20a. (1) It shall be unlawful (A) for any licensee hereunder or for any person affiliated with a licensee, or (B) if such action tends to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, for any corporation engaged in transmitting or receiving electrical energy across any State boundary, or for any person affiliated with such corporation, or for any person purchasing power from any such licensee or corporation or from any person affiliated with such licensee or corporation for sale and distribution or use in public service (hereinafter in this section referred to in each case as the seller), to sell or offer for sale electrical energy in one community at a rate or rates higher than the rates at which electrical energy is sold or offered for sale in another community by the seller or a person affiliated with the seller, unless in the community having the higher rate or rates the cost (as referred to under the provisions of subdivision (7) (B)) to furnish a like service is greater and the rate or rates in the community having the higher cost shall not exceed the rate or rates for a like service in the community having the lower cost by a greater percentage than the percentage difference in said cost to furnish the service, except as hereinafter provided.

"(2) Jurisdiction to enforce the above provision is hereby conferred upon the commission upon the complaint of any party aggrieved or upon its own initiative; and in any such case the commission shall have power to prescribe the rate or rates thereafter to be charged, in such manner as, in its judgment, will remove the unlawful element and such advantage, preference, prejudice, or discrimination. The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

"(3) When the seller or any person affiliated with the seller may be experiencing in any community the competition of a municipal corporation engaged in selling electrical energy to the public at rates determined by the commission to be insufficient to fully reimburse said municipal corporation for the cost (as defined in subdivision (7) (C)) to deliver the electrical energy so sold, the rate or rates at which the seller or person affiliated with the seller is selling or offering for sale electrical energy to the public in that community shall not be taken into consideration in determining the lawfulness or unlawfulness, under the provisions of this section, of rates charged elsewhere. The determination whether or not said rates are insufficient for said purpose shall be made only after sixteen months operation on a commercial scale, by the municipality, of its electric property. For the purpose of said determination there shall be included in the municipal income from the sale of electrical energy a sum equal to the fair market value of all electricity delivered for municipal use from the municipal electric property.

"(4) The act of selling or offering for sale electrical energy at different rates for a like service shall be deemed to be prima facie evidence of a violation of this section; and the burden of proof shall be upon the seller to prove

when rates are different in two different communities that such a difference does not tend to unduly prejudice or unjustly burden interstate commerce, and to prove the actual difference and the percentage difference in cost which it may allege exists in furnishing a like electrical service in different communities and to show that a rate offered or charged in competition with a municipal corporation should not be taken into consideration in determining the lawfulness or unlawfulness, under the provisions of this section, of rates charged elsewhere.

"(5) It shall be unlawful for any person described in subdivision (1) to sell or lease all or any part of this property used and useful in the business of distributing electrical energy to the public except at a price and to a purchaser or lessee and under terms and conditions approved by the commission; but the price at which such property in any State may be sold shall not be less than the value of that property properly allocated, as determined by the commission, from the aggregate total value of the property of the seller in that State returned by it for rate-making purposes to the State agency, if any, having jurisdiction over its rates; and if no such State agency exists, then from the aggregate total book value of the property of the seller in that State. For the purposes of this section the commission shall take into account the facts, circumstances, and conditions surrounding or incident to the relationship of seller and purchaser, or of lessor and lessee, which shall be fully disclosed to the commission, and when it appears that the sale, lease, or transfer is not bona fide for lack of consideration or failure thereof or for other cause, the purchaser, lessee, or transferee shall be deemed to be an affiliate and the duties and obligations of the parent as defined in this act shall be continued as though no attempted sale, lease, or transfer shall have been made: *Provided*, That the transfer of ownership or control by declaration of a stock dividend shall not be recognized as a bona fide transfer of such a nature as to avoid the obligations hereby imposed: *And provided further*, That the purchases of electrical energy by the affiliate shall likewise be subject to inquiry by the commission in determining the bona fides of such transaction. No such sale or lease shall be approved by the commission except after a finding that such sale or lease will not have the effect of permitting an evasion of the provisions or purposes of this act; and any such sale or lease which results in an evasion of the provisions or purposes of this act shall be void: *Provided, however*, That the limitations upon a sale or lease, as in this paragraph (5) expressed, shall not apply to a sale or lease to a municipal corporation.

"(6) Any person or, in the case of a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other person or corporation, shall willfully do or cause to be done, or shall knowingly suffer or permit to be done, any act, matter, or thing prohibited by this section or declared to be unlawful, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than $1,000 nor more than $5,000 and imprisoned for a term of not less than six months nor more than two years, and each day such violation continues beyond thirty days shall be deemed a separate offense.

"(7) For the purposes of this section—

"(A) The word 'community' shall be construed to be any area within which the rates of the seller are the same to all consumers for a like class of electrical service.

"(B) In determining the cost to deliver electrical energy in any community the property of the seller or any person affiliated with the seller alleged to be used and useful in delivering electrical service to that community shall be properly allocated to that community and to it shall be assigned a value properly allocated from the aggregate total value of the property of the seller and person affiliated with the seller returned for rate making purposes to the State agency, if any, having jurisdiction over its rates in the State in which said community is located, or from the aggregate total book value of said property in said State if no such agency exists therein; or, in the event a different and more authoritative aggregate total value has been determined or established by competent authority as a basis for rate making and for the then existing rates, then the value to be assigned shall be properly allocated from said different and more authoritative value. The cost, for the purpose of determining, under this section, the lawfulness or unlawfulness of any rate or rates, to any person to deliver electrical energy in any community shall be deemed to include a reasonable return upon a property value properly allocated to that community from the said total aggregate property value.

"(C) The cost to a municipal corporation to deliver electrical energy to the public shall be deemed to include its expenses in operating and maintaining and the interest accrued on, and a reasonable sum (as defined in paragraph (D)) for expected depreciation on, that part of the investment and property of said municipal corporation used in so delivering electrical energy, and in addition a sum equal to the accrued tax that could be properly assessed thereon by said municipal corporation had the same been owned by the seller. It shall be deemed that the several parts and elements of the municipal property, and the municipal investment corresponding thereto, are being used, in respect of any said part and element, only in the proportion that the electrical energy generated, transmitted, or delivered therewith bears to the capacity thereof to generate, transmit, or deliver electrical energy, plus 10 per centum of said proportion; but not exceeding in any event 100 per centum.

"(D) The reasonable annual sum for expected depreciation shall be deemed to be that sum which, if invested semiannually in the bonds of the said municipal corporation at market prices, would yield a sum sufficient to enable the said municipal corporation to replace at the expiration of their respective lives the several parts and elements of its said property used in furnishing electrical energy to the public.

"(E) 'Person' means any individual, private corporation, partnership, association, or common law trust.

"(F) Two or more persons shall be deemed to be affiliated if they are members of a group, composed of a parent and its subsidiaries and of other corporations, of which each member except the said parent is a subsidiary of some other member of the group.

"(G) 'Parent' means any person or group of persons controlling one or more corporations or the operations or management thereof, whether by ownership or control of stock, or by interlocking directorates, or otherwise. The ownership or control by any such person or group of persons of 15 per centum or more of the stock of any corporation shall be prima facie evidence of the control of such corporation and of its operations or management by such person or group of persons. A corporation to which such person or group of persons sustains the relationship of parent is herein termed a 'subsidiary' of such person or group of persons.

"(H) 'Like service' means an electrical service charged for under a like general classification.

"(8) No basis for a complaint under this act shall exist because of a difference in rates for a like service between two communities separated by a greater distance than three hundred miles."

SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of the act and the application of such provisions to other persons or circumstances shall not be affected thereby.

The bill is a process of evolution reaching over several months and while we think the result sought to be accomplished is very simple yet, in order to cure a lot of possible loopholes that might enable those bound by the bill, or sought to be bound by it, to escape, it has been necessary to draft it with a great deal of care, and we think that we have finally succeeded in doing that. Of course, simple results are sometimes accomplished by what appears to be very cumbrous machinery, and we think that the result to be accomplished by the bill would be entirely simple, in that it would make impossible the charging of discriminatory rates for electric service in the same manner that the Interstate Commerce Commission deals with the subject of discriminatory rates for transportation services under section 3 of the act to regulate commerce, as that section has been construed by the Supreme Court in the famous Shreveport case (234 U. S., 342).

Mr. Parker asked a question yesterday of Chairman Smith, indicating that if this bill, or some similar bill, were passed investing

the Federal Power Commission with additional jurisdiction to take care of situations of this sort, it might create another huge governmental machine like the Interstate Commerce Commission.

Mr. HUDDLESTON. Before you proceed on that, I did not have anything in mind in calling attention to the bill, except with reference to its form.

Mr. DRAYTON. I am coming to that.

Mr. HUDDLESTON. I wanted to know whether we could not have some simple measure which would answer your purposes.

Mr. DRAYTON. As I read the present bill, it already provides for handling the matter of discrimination in rates.

Mr. HUDDLESTON. Not with reference to nonlicensees.

Mr. DRAYTON. No. And that is just one feature that we do hope will be corrected in this proposed bill. That is an important element in it, and I will discuss that in a few moments.

Mr. HUDDLESTON. Now, would it be within the power of the commission under the water power act to remove these discriminatory rates?

Mr. DRAYTON. Well, I hope to show you that, in going ahead with the argument, in another place, if you will excuse me for just a moment, I am going to come to that.

The answer to Mr. Parker's suggestion, I submit, is that the problem is very much simpler here from every viewpoint.

The Interstate Commerce Commission deals with thousands of rates, classifications, and practices, applying on thousands of different commodities, carried by hundreds of railroads. Here, we are dealing with a single commodity—electricity—supplied by a comparatively few companies, under very much less complicated conditions, and which conditions ordinarily are so nearly identical as to cause or justfy comparatively few differences in rates. I do not see how you could anticipate any such enlargement of the functions of the Federal Power Commission.

Mr. PARKER. Mr. Chairman, will the gentleman yield?

Mr. DRAYTON. Yes.

Mr. PARKER. How would you get at what were proper rates? Would you not have to go in and value the property?

Mr. DRAYTON. Well, as to that, I think it is not necessary.

Mr. PARKER. Would you not have to have a valuation, right out to the last item?

Mr. DRAYTON. Well, under the present bill, valuations are required as to licensees.

Mr. PARKER. I will grant you that, but still they would have to open the books, on the building of the dams, and all of that.

Mr. DRAYTON. Perhaps that is true.

Mr. PARKER. They do not have to estimate now what some of the buildings cost.

Mr. DRAYTON. But you would be surprised, Mr. Parker, at how many of these companies, now doing business, are licensee companies, and the number is growing continuously, as you will see by the report of the power commission, the twelfth annual report, and especially by the report that they made on the holding companies' control of licensees.

But as a matter of fact, under this bill, no valuations by the Federal commission would be necessary. Only where the power company itself initiates a difference in rates giving rise to a complaint of unjust discrimination, does the jurisdiction of the Federal commission become vested. Then, under paragraph (4), the burden of proof devolves upon the company, or "seller," to justify the discrimination. That burden may be discharged by showing a sufficient difference in the cost of furnishing a like service in the different communities. In arriving at such cost of furnishing the service in the community accorded the lower or preferential rate, a proper allocation of value of the property used in such service is required under paragraph (7) (B), but the Federal commission, even then, is not required to make a detailed appraisal of the whole or any part of the plant. It merely ascertains, as an evidentiary fact in the course of that particular proceeding, what value has been returned to the State agency by the seller for its whole property in that State for rate-making purposes; or, if no such State agency exists—

From the aggregate total book value of said property in said State;

or—

In the event a different and more authoritative aggregate total value has been determined or established by competent authority as a basis for rate making and for the then existing rates, then the value to be assigned shall be properly allocated from said different and more authoritative value.

Thus, it will be seen that the bill carefully refrains from imposing any costly or comprehensive duty on the Federal commission with respect to valuation and this would seldom, if ever, be necessary to the accomplishment of the purpose of the bill, which is to secure equality in rates where it may be properly found that inequality results in unjust discrimination.

But even in the rare case where the Federal commission, in order to correct unjust discrimination, is required to finally fix a level of interstate rates, it may base its conclusion on the best evidence available in that case on the question of value. The power company charged with the discrimination, and upon whom the burden of proof rests, adduces such evidence as it may deem proper, and this is subject to refutation by opposing parties. Thus the record appropriate to the case is made. When the Interstate Commerce Commission, on March 11, 1912, announced its decision in the Shreveport case and prescribed a reasonable level of interstate rates from Shreveport to Texas points, the act requiring a general, comprehensive valuation of railroads had not even been passed. That act did not become effective until March 1, 1913, and, of course, the commission had been passing upon the reasonableness of rates since 1887. Moreover, in the Shreveport case the commission gave little, if any, consideration to valuation in prescribing reasonable rates. In the several country-wide cases involving proposed general increases in rates the commission has not had available the detailed valuation of the railroads which the valuation act contemplates. So far as it thought necessary to the decision of any of these cases the commission accepted in evidence the best information then available on the question of value.

That the Federal Power Commission may do the same is indicated by the decision of the Court of Appeals of the District of Columbia (which is a final adjudication because of the denial of the petition for writ of certiorari by the United States Supreme Court), in Clarion River Power Co. *v.* Smith (59 Fed. 861). In that case it was held that the Federal Power Commission may make an investigation to ascertain the original cost and net investment of any licensee at any time as an administrative matter in order intelligently to exercise its extensive regulatory and supervisory powers. The company filed with the commission a statement representing the actual, legitimate cost of the construction of its project to be $11,032,816.57. An examination and audit of the books of the Clarion Co. was made by the accounting division of the commission, and a report was filed recommending the elimination of the sum of $6,213,904.78 from the statement of actual legitimate investment. The company filed a protest, insisting that its original statement was correct and asserting that the Federal Power Commission was without jurisdiction to make any adjudication or order with reference to the cost of the project. The court, however, upheld the order of the commission making the eliminations referred to above.

We submit, therefore, that it can not fairly be contended that in order to deal with the exceptional case to which the proposed bill is directed, a costly, country-wide valuation of properties used in the production and distribution of power is necessary. On the contrary, the commission would take such evidence as might be deemed competent and relevant in the particular case.

Mr. PARKER. Do you not think that, as a matter of practical effect, that your rates, for the State of Georgia, and the State of Alabama, and the State of Mississippi, would eventually equalize under the laws?

Mr. DRAYTON. That is provided for in here.

Mr. PARKER. Well, I am not speaking of to-morrow. I am speaking of eventually, to carry out the system that is advanced in this way.

Mr. DRAYTON. Only in so far as that sort of power would be along the lines of the power which the Interstate Commerce Commission exercises.

Mr. PARKER. Yes, practically along that line.

Mr. DRAYTON. Under the Shreveport case.

Mr. PARKER. But, practically, the tariff on all of these is going to be interstate, as well as intrastate.

Mr. DRAYTON. Mr. Parker, if that is necessary to accomplish what is here needed in the public interest, I think that ought to be done, but I do not think that it will ever deprive the States, through their State commissions, of control over their intrastate affairs. It is no invasion of their state functions. We can not do that under this law.

Mr. PARKER. You could not, on purely intrastate.

Mr. DRAYTON. Now, there could not be any objection to having the same level of rates on a nondiscriminatory basis, in Alabama, and Mississippi, and Georgia.

Mr. PARKER. I was not discussing it from that angle. I was discussing it from the angle of concentration of power.

Mr. DRAYTON. Well, if that is so, and if you deplore it—and I am a sort of a States' rights man myself—it is just inescapable, can not be helped, because we are faced here with a condition, and not a theory, and where it has been necessary for the Federal Government to take control of these things, it has been done invariably. So now, we hope you will not stop short in this particular instance, as we hope to show you it is required in the public interest.

Mr. PARKER. My theory is that the public interest goes, perhaps, to use an expression which is not apt here, but nevertheless, you understand what I mean—I think perhaps the Federal Government should govern the wholesale prices that go over State lines, but when it gets into an intrastate situation, where your intrastate company distributes it, and is the real distributor, then, I believe, it is entirely in the hands of the State. That is my theory.

Mr. DRAYTON. Well now, suppose that we take this sort of a case that I mentioned yesterday, where a point is within a few miles of the Alabama boundary, and has lower rates than they have over in Alabama.

Mr. PARKER. Yes.

Mr. DRAYTON. Now, the Georgia commission is tied to jurisdiction within that State.

Mr. PARKER. Yes.

Mr. DRAYTON. Now, the lower rates there just across the State line might attract the location of industries, which are just as much entitled to go into Alabama, and perhaps, Alabama is just as much entitled to have them do so, and there is only one way of correcting that condition, and that is through the Federal Power Commission having authority to outlaw the discrimination that would cause this unjust condition.

Mr. PARKER. I would not deprive the States of the right to fix those rates.

Mr. DRAYTON. Well then, if Georgia has that power to control those rates, whatever that commission may do may cause the Alabama commission to make a similar reduction, and you have got the States controlling interstate commerce indirectly, and you have no assurance of uniformity or consistency.

Mr. PARKER. My theory would be to fix the prices, the wholesale prices, across the line, which the distributing company pays. If they had that power, exercised that function, what would the results be?

Mr. DRAYTON. Well, that comes under this bill, the wholesale prices, but we would like also to cover the rates actually charged, and you could not fix that unless you controlled the whole business. The Supreme Court has, in several cases, stated how difficult that is. I mean, in dealing with the power industry.

Mr. PARKER. I will not take up any more of your time. This may be irrelevant as to the particular issues here involved.

Mr. NELSON. You say that this bill contemplates the fixing of prices on electricity going across interstate lines?

Mr. DRAYTON. Yes, sir; but only indirectly, by prohibiting unjust discrimination.

Mr. NELSON. Can you do that? Does the fixing of the sale price come under the power to regulate commerce?

Mr. DRAYTON. Well, I think that that is a power that they have under the doctrine of the Shreveport case. I think that, as that power is fed into the different cities, and actually consumed, as that is done, that it is a part of an interstate transaction. It has come from another State, as you heard Mr. Williams explain yesterday. You can not tell where that power is derived from. It may be manufactured here, or at some other place.

Mr. NELSON. Suppose the Federal Government assumes control over the transmission of power in interstate commerce, and the power is transmitted from Maine to New Hampshire, for instance. Do you think that you could fix the price at which that power must be sold?

Mr. DRAYTON. Well, we hope so. That is the purpose of this bill, to bring all corporations under Federal control to that extent.

Mr. NELSON. Well, is that regulating interstate commerce, to fix the price at which anybody may sell power?

Mr. DRAYTON. Well, we limit the scope of this, under the amended bill, to 300 miles, so that power from Maine would have no effect on the rates in Georgia under this bill.

Mr. NELSON. I do not want to get into any discussion. I want to know whether it can be done. I do not know whether it can be done or not. Can we fix the prices of a commodity? Is that included in the regulation of transportation, the fixing of the selling price?

Mr. DRAYTON. Well, what is the difference between electricity going over these lines, in interstate commerce, manufactured in one State, and consumed in another, going over a power line into another community, and interstate commerce in transportation? I do not see any difference at all.

Mr. NELSON. Is there not a difference though? Can you fix the price of potatoes coming out of Maine into New Hampshire?

Mr. DRAYTON. No. That is not a public utility. That is not a property dedicated to the public use. Where you have got a public utility which dedicates its property to the public use, there you have a service, I think, which is subject to control and regulation, just like interstate transportation.

Mr. NELSON. And, under the interstate commerce clause, you can fix the price at which it is to be sold?

Mr. DRAYTON. Well, I do not see any reason why Congress could not, under this power to regulate. That is what the Supreme Court in the Shreveport case held attached to the Federal power under the Constitution.

Mr. LEA. Mr. Drayton, do I understand you to say that the Supreme Court has already confirmed that power?

Mr. DRAYTON. Well, the Supreme Court, in several cases, has shed some light on that situation.

Mr. NELSON. Not the fixing of prices.

Mr. DRAYTON. No, but they have held that, in dealing with the rates charged by a gas company, for example, it is proper to examine the entire charge for the service. This was the case of Western Distributing Co. *v.* Public Service Commission (285 U. S. 119). There it was held that a natural gas distributing company, seeking an increase in its retail rates, must offer satisfactory evidence of the reasonableness of the interstate wholesale rate for gas furnished at a city gate, where pipe line and distribution companies were under single ownership and control. Now, that related to the power of a State commission to deal with rates charged in a particular community. This bill does not take away that power. It is not intended to transfer such jurisdiction from the State commissions to the Federal commission. We are willing to have the bill amended in any way necessary to make this clear. The only power sought to be conferred under this bill on the Federal commission is the power to correct discriminations as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, which discriminations are not warranted by a difference in costs. I cite the Western Distributing Co. case merely as establishing the principle that wherever it is necessary to consider the service as a whole in order to sustain the power to regulate in the public interest, that may be done.

It may be conceded that rates charged a given community for electric service are subject to regulation by State authority, when it can be shown that the generation, transmission, and distribution constitute one complete service performed wholly within the confines of a single State; but when such service is performed partly in one State and partly in another it is interstate, and therefore may be regulated by the Federal Government. Furthermore, under the doctrine of the Shreveport case, if the regulation of the level of such rates within a State produces unjust discrimination against interstate commerce, that is ground for conferring jurisdiction on the Federal commission, not necessarily to fix the level of the rates, but to declare the rule in so far as may be necessary to correct such discrimination. Respecting interstate tolls of telephone companies, it was held in Smith *v.* Illinois Bell Telephone Co. (282 U. S. 133), that these—

> Are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination either of the Illinois commission or of the court in dealing with the order of that commission. The commission would have had no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the company was too small and could be increased to make good the loss. The interstate service of the Illinois company, as well as that of the American company, is subject to the jurisdiction of the Interstate Commerce Commission, which has been empowered to pass upon the rates, charges, and practices relating to that service.

When the regulation of intrastate rates for services, either telephone, telegraph, or power, interferes with, imposes a burden upon, or causes a discrimination against interstate rates, then the Federal Government has a right to interpose by suitable regulation to remove the interference, burden, or discrimination.

Mr. NELSON. That was all a matter of rates, was it not?

Mr. DRAYTON. Yes, sir. This is a matter of rates too.

Mr. NELSON. Where do you find any case which says, under the commerce clause, that the Congress, or that the commission can fix prices of a commodity traveling from one State to another?

Mr. DRAYTON. Well, now, what do you mean by prices, Mr. Nelson? You mean rates?

Mr. NELSON. Where is there any authority for anybody, under the commerce clause, to fix the sales price at which electricity, as a com-

modity, shall be sold from one State to another. After it gets to another State, that price may be the basis for fixing the rate, but you are going to say what that price will be, and, under what clause of the Constitution?

Mr. DRAYTON. I think that the principle is that that is a part of the whole service, from the beginning to the end, that is, the manufacturing and distribution of it, over the wires, and the sale of that in that community, and then that, as a whole, is subject to Federal regulation.

Now, you mentioned potatoes. I do not think that is analogous at all, if you will pardon me for saying so.

Mr. NELSON. Does the commerce clause make a distinction and have any greater effect when dealing with commodities going into the public service than it does with any other commodities?

Mr. DRAYTON. I think it does; yes, sir. That is, to regulate commerce under the commerce clause. It is interstate.

Mr. NELSON. Then under that clause, if the article goes into a public utility use you have more than power to regulate, you have power to fix the prices?

Mr. DRAYTON. Well, I do not see any difference between fixing that price, if you prefer to call it that, or rates, as I would prefer to have you say, than the rates for transportation of freight.

Mr. NELSON. The point that is bothering me is that I do not see how, under the clause allowing you to regulate interstate commerce, you can fix the price. That is what is bothering me.

Mr. DRAYTON. Well, why not? It is a rate. It is an interstate rate.

Mr. NELSON. I do not see how you can fix the price. I can see how you can make a rate. You can make a rate and prescribe regulations for transportation, but how you are going to get authority to determine its price is something that I can not see.

Mr. DRAYTON. Well now, this is a service, and this is a rate for services performed by a public utility.

Mr. NELSON. It is rate only as regards transportation charges.

Mr. DRAYTON. Well then, you might just as well say that the ultimate thing is a commodity, and therefore, you can not fix the price at all, because it happens to be manufactured and sold in different States.

Mr. NELSON. Under the commerce clause as I understand it, you can regulate the transportation of articles, any other article, but you can not fix their price.

Mr. DRAYTON. No; not on ordinary commodities.

Mr. NELSON. Well, how can you fix the price at which electricity is sold? That is what is bothering me. I know that you can fix the interstate commerce rates for its transportation, but how can you fix the delivery price on electricity? You can establish freight rates; that is transportation. I can see that. I can see how you can regulate the charges for freight rates because it is an interstate service, but I do not see how you can fix the price at which I shall sell electricity.

Mr. DRAYTON. Because I regard it as a completed service, just like a transportation service.

Mr. NELSON. Well, that is regulation of transportation, but when you set the price at which I shall sell the thing transported, that is a different matter. What has that got to do with the regulation of transportation?

Mr. DRAYTON. Well, after all, we fix the price at which transportation is sold, and that power certainly is in the Federal Government, as exercised by the Interstate Commerce Commission.

Mr. NELSON. No. I am willing for you to fix the price of transportation, by the railroads, and in interstate commerce, but I am not willing for you to tell me at what price I can sell my product. I fix my own price on my own electricity, having paid all proper interstate charges.

Mr. DRAYTON. You mean, on the goods after they are transported. That is similar to the case that you have in mind, it seems to me, sir. In other words, you transport a carload of freight, flour, we will say, and that flour is sold then by the fellow who gets it, down in Texas, or anywhere else, at the price he chooses. Well, nobody attempts to fix that price, and that is not the purpose here, but the transportation service on that flour is fixed, and is subject to regulation, and here is service which is a completed service interstate.

Mr. NELSON. Assuming that I have a power plant in Maine, and that I am selling, or that I want to sell, electricity across the line at so much per kilowatt, or however it is measured, and that I make a contract to sell at that price. Now, you represent the Federal Power Commission, which has authority over the transportation of that commodity. How are you going to regulate its price? There may not be anything to it, but I never could understand how the Federal Government can regulate prices.

Mr. DRAYTON. I am going to regulate prices on a complete interstate service. Now, that is the best answer I can give.

Mr. NELSON. We are not acting under any public service commission law. We are simply considering the matter of interstate commerce.

Mr. DRAYTON. Well, that is interstate commerce in that particular service.

Mr. NELSON. And then, under the interstate commerce clause, Congress can regulate the sales? How are you going to fix those prices?

Mr. DRAYTON. I really do not know how to answer you any more definitely than I have done, Mr. Nelson.

Mr. NELSON. Under the commerce clause alone I do not see how the Federal Government can fix the prices at which I should sell electricity.

Mr. DRAYTON. If I have not satisfied the committee on that, I would like to have permission to write a little memorandum on it, and see if I can clear it up.

Mr. NELSON. I would like to have it, because I never could see it.

Mr. LEA. In that connection, has the contention been made that the fixing of prices is a necessary incident to the regulation of the transmission of power?

Mr. DRAYTON. Yes, sir; that is a contention we do make.

Mr. WILLIAMS. That is our point.

Mr. DRAYTON. That is our point.

Mr. LEA. You are going to cover that in your presentation?

Mr. DRAYTON. I hope to show that.

Mr. LEA. I am very much interested in this question, as to the power of the Federal Government to regulate, and I hope that you will cover that as thoroughly as you can.

Mr. DRAYTON. If I do not cover it adequately, I will ask the chairman to let me submit a little memorandum on it within a few days.

Mr. NELSON. How does the price have anything to do with the transportation? Unless you can have a charge based on the value of the product, how would it be affected?

Mr. DRAYTON. You are asking me an engineering question. Mr. Williams says that he would like to answer it for me, and I would like to have him interpose at this point, in order to answer Mr. Nelson's question.

The CHAIRMAN. Are you a lawyer?

Mr. WILLIAMS. No, sir; I am not a lawyer. I think that I have the point in mind, as an engineering one, to show that it is necessary as an incident to the regulation, in connection with regulation.

The CHAIRMAN. You want to let him go ahead? He may use your time, Mr. Drayton.

Mr. DRAYTON. Yes, sir; I will yield him time.

The CHAIRMAN. Go ahead.

Mr. WILLIAMS. Just this one point only, the only thing I have in mind on the question. This may not satisfy you, but I just want to say this, that if the wholesale price of the commodity or really part of a service coming into the State is known, and then put in on their books, that is, on their records and reports to the regulatory agency, if that price is very high, as compared with the actual cost of that service, then the State regulatory agency has a right to look beyond and into the reasonableness—I mean, unless they do look into that, they might fix a rate which would result as an exhorbitant and unreasonable rate. That goes without saying. That could be true unless you will allow them to look into the prices of the wholesale current that comes across the State line, and now, then, that is the transportation end of the wholesale service.

Mr. NELSON. That is what?

Mr. WILLIAMS. The transportation end of it. If that price or rate is high, why, then, it would result again in putting an unjust burden on some other community, just like the illustration that was given here this morning by Mr. Drayton about the two towns right close together in two States. One might have a large retail business, with attendant commerce and freight and other benefits, but the other town, right across the State line, if it had higher rates, because of this unjust price of interstate transportation service across the State line might have all business driven away, and that certainly would be discrimination against that State, and that the State could do nothing about it, and the only authority that could have anything to do with it would be the United States Government, as I see it.

Mr. NELSON. Under what clause?

Mr. WILLIAMS. Well, I can not answer that. I think that the State certainly could not have jurisdiction over those two things in two different States and I do not see how——

Mr. NELSON. So you conclude that the Federal Government has?

Mr. WILLIAMS. No; not now perhaps, but I think that it should have, if it is necessary to relieve a discrimination between two communities in two different States.

Mr. NELSON. If these two public service corporations concerned, if they were both licensed under some Federal Power Commission, under the Federal power act, then they could act, but how can they act simply under the commerce clause of the Constitution to make prices equal in every community on every commodity in every State?

Mr. SHALLENBERGER. Mr. Nelson, could I ask a question there?

Mr. NELSON. Yes, Governor.

Mr. SHALLENBERGER. One gentleman who appeared before the committee said that you talked just like the supreme court.

Mr. NELSON. You are making fun of me now.

Mr. SHALLENBERGER. No, I am not.

Mr. NELSON. I am not attempting to do anything like that, but the thing that is bothering me is, I do not see how you can fix the price at which a commodity is to be sold, which is to be transported, under the clause to regulate commerce, or regulate transportation.

Mr. SHALLENBERGER. I want to ask this question: Several States in the Union have passed laws, similar to this, to regulate the sale of property, and also the buying of property, where great corporations were using the power of unfair competition to destroy certain competitors, and I know that in the State of Nebraska we have got such a law, to protect those engaged in the creamery business, and also in the sale of oil, and there have been cases taken to our supreme court, and possibly to the Supreme Court of the United States, and the validity of that law was sustained. The law aims to prevent unfair prices.

It seems that we do not have any law of that sort, so far as Federal action is concerned.

Now, is it not possible to have the Federal commission, as proposed in this bill, given power not to fix prices, but to prevent unfair or discriminatory prices, when used to destroy competition?

Mr. NELSON. Do you think that, because a pipe line transports oil out of your State, or into your State, or out of Oklahoma into another State, that we can sit here and pass laws, or amend laws, making the prices, or fixing the prices, at which you, as the owner, can sell that oil?

Mr. SHALLENBERGER. I think that we can fix the price to this extent, that we can say that they shall not destroy competition by unfair competition or unjust methods.

Mr. NELSON. Under the commerce clause?

Mr. SHALLENBERGER. Under some clause. I do not know much about that clause, but under some clause, because it has been done, in principle, in many States, and I think now we can apply it in a Federal act.

Mr. NELSON. I do not know. That is bothering me.

Mr. SHALLENBERGER. I do not know that we can do so either, but I do not think this bill attempts to go so far as to arbitrarily fix prices, but only to prevent unfair competition.

Mr. NELSON. I do not think it does, but I am speaking about the principle, and, assuming that it is sound, I was wondering if we

could go that far, and if we can say what they should sell electricity for.

Mr. DRAYTON. Well, the main purpose of this bill, of course, is to prevent discriminatory rates and services.

Mr. NELSON. Yes, but you have hooked up with that more power than comes to you under the commerce clause. Do you not have further hooked up with it a section under the Federal Trade Commission, giving this power as you have given it here?

Mr. DRAYTON. Of course, as to the licensees, I assume that this commission now has that power, because that is a condition prerequisite to giving the license.

Now, the extension of that power to corporations which are not licensees, which are engaged in this sort of business, is just to prevent unjust discrimination, such as is condemned in the Shreveport case.

What we would like to accomplish is——

Mr. HUDDLESTON. Mr. Drayton, may I call your attention to the fact that you have used 37 out of your 40 minutes?

Mr. DRAYTON. Yes, sir. And, I do not think that I have consumed anything like all of that time myself. I am sorry I have not gotten anywhere on this argument. But, maybe it was not directed to the proper point.

Mr. HUDDLESTON. May I suggest that you proceed?

Mr. DRAYTON. Thank you, sir.

We think the premise, that electricity is a commodity to be sold like potatoes and, therefore, that any attempt to prescribe nondiscriminatory rates is equivalent to price-fixing, is wholly unfounded in fact and in law. The supplying of electrical energy is a service, just as is communication by telegraph, telephone, or radio. Regulation of the telephone and telegraph under the act to regulate commerce and of the radio under the act creating the Radio Commission is taken as a matter of course. The constitutional power of Congress to regulate those services is generally conceded. It might just as well be argued that the corporations performing these services in interstate commerce could escape Federal control by the simple expedient, in the case of the telegraph company, of transferring to an entirely independent corporation the furnishing of messenger boys to deliver messages locally; or, in the case of the telephone company, to have an independent corporation relay messages through a local switchboard service, as to say that the power companies may convert what otherwise would be an interstate service into a commodity, under the principle of the original package cases, the price of which, because it is to be regarded as a commodity under this theory, would not be subject to regulation. But we are not dealing here with a commodity in any sense. It is a service rendered by a public utility whose property has been dedicated to a public use, subject to all the obligations attaching thereto.

In Baltimore & O. S. W. R. R. *v.* Settle (260 U. S. 166), it was held that whether the transportation is to be regarded as interstate or intrastate is not necessarily determined by the contract between shipper and carrier, but depends upon the essential character of the movement. And a long line of cases was cited to the effect that a carrier can not by separating the rate into its component parts,

charging local rates and issuing local waybills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.

Moreover, the local distribution of electrical power, as a practical matter, is not generally performed by a separate corporation unaffiliated with another corporation under the same management by whom the power is generated and transmitted. The three services, generation, transmission, and distribution, are generally performed by a single corporation as parts of a closely related whole, just as are the telephone, telegraph, and radio services.

The Supreme Court has upheld the jurisdiction given the Interstate Commerce Commission to authorize the abandonment, for intrastate as well as interstate commerce, of a branch line wholly within the State if the branch be operated by an interstate railroad, when to continue the operation would be a drain upon, or an undue burden upon, the revenues, as a whole, of the interstate railroad. This is based upon the recognized authority in Congress to protect interstate commerce. Now, what this bill does is to protect the revenue of the interstate power line by prohibiting it, or its affiliate, from reducing below cost, or below a proper charge, the rate for electricity in a particular locality. The bill in this way reaches and attempts to cure two evils, the one above set forth and the other the temporary reduction of power rates in a locality to kill off municipal or other competition. If that is accomplished the consumer should be entitled to the continuance of the reduced rates. This is not a new principle. It is the same principle embodied in another form in section 4, paragraph (2) of the interstate commerce act, providing as follows:

> Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Here is a service upon which industry and commerce very largely depend and which is essential to the general welfare. The limited control which this bill proposes to give the Federal commission to regulate this service can not be held to go beyond the power of Congress under the commerce clause. No power is proposed to be given the Federal Power Commission to initiate, establish, or determine definitely the prices or rates at which electricity shall be sold at any point or within any State. That is left for the State commissions. Only where a case arises which involves an unjust discrimination resulting from a difference in charges between the intrastate service and the interstate service is power given the Federal commission to intervene. In such case the exercise of jurisdiction is dependent upon: (1) The identical corporation or its affiliate must charge and be responsible for both the higher and the lower rates; (2) such difference in rates must tend to cause an undue or unreasonable advantage, preference, or prejudice as between (*a*) persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or (*b*) unjust discrimination against interstate or foreign commerce; and (*c*) the jurisdiction of the Federal commission may be exerted to condemn the difference only in

so far as such difference is not affirmatively shown to be justified by a lower cost to furnish the service in the one case than in the other. This falls far short of vesting in the Federal commission the power to fix prices at which a commodity shall be sold in a State. Electricity is not a commodity but a service which is equally dependent upon each of several separate processes or acts in order that it may be completed, i. e., generation, transmission, and distribution. As pointed out elsewhere, if any one part of such service should be severed from the rest, it becomes no service at all, but a mere collection of machinery and wires.

It is true that when any electrical consuming device is connected we ordinarily say that we receive current. But current is not the thing that the consumer has retained; he has retained energy derived from the current. There has been no diminution of the current. As a matter of fact, just as much current returns to the source as has been transmitted. What the device actually has consumed is energy, and no one would say that energy is a commodity. Of course, this energy is always converted into some other kind of energy by the device designed for its use—necessarily so if a service of some sort is to be made of it. So that what is actually received and paid for is a service which is made possible by the use of the electrical energy, whether it is a wholesale price on interstate energy or a retail price on intrastate energy does not tend to make it a commodity in either case. It is an instantaneously created service usable at the will of the customer; and this service is made up of various component parts or elements each of which is essential to the completed service which the customer finally pays for.

Chairman Smith made a statement indicating that should this amendment be adopted, there would be very little occasion for the exercise by the Federal Power Commission of its jurisdiction to prescribe reasonable and non-discriminatory rates. That is our contention. In other words, if this bill is enacted, it will produce and preserve a level of rates which will be reasonable and nondiscriminatory, and so, regulation will be practically automatic. This will be accomplished by casting the burden of proof on a company making a difference in its rates not justified by the conditions defined specifically in the bill. The conditions dealt with in the act to regulate commerce, and which result in a tremendous burden of work for the Interstate Commerce Commission, are not comparable, as I have attempted to show. Here, by a very simple expedient, you regulate automatically, in a way not possible in respect of freight or passenger transportation.

A power company's operations, after all, are comparatively simple, and ordinarily there would be no justification for any difference in its charges for a like service. If there is, then this bill does not deprive them of the right to show it. A company will not make a discrimination in its charges without justification for thereby it will incur the burden of reducing its other rates. Moreover, it will make sure that its charges are reasonable so as not to invite competition in a particular territory. If its charges are based on a fair capitalization, it need fear no competition, and none will arise. If the municipal plant ignores proper costs in the fixing of its rates, then under the bill, the private corporation is at liberty to compete

at the particular point without any obligation to apply like rates elsewhere. Since it may do this, there is practically no chance for any such unfair competition from the municipality.

And so I say, the whole purpose of this bill is to provide a fair field and no favors by protecting the smaller, less strongly entrenched interests from being stamped out by unrestrained and ruthless competition in a limited field.

Mr. LEA. Could I ask a question at that point?

Mr. DRAYTON. Yes, sir.

Mr. LEA. Do I understand that this bill provides for equally reasonable rates, regardless of the question of discrimination?

Mr. DRAYTON. Well, I do not think the question of reasonable rates would ever arise, and that is a secondary consideration. If that is not a desirable thing, or there is any doubt about it, I think that we could get along without any provision for the power in the Federal commission to prescribe reasonable rates.

Mr. LEA. I wanted to know if your construction of this bill was that it provided equally reasonable rates, regardless of discrimination.

Mr. DRAYTON. No, I do not think so. I think it must be coupled up with the discrimination feature.

Mr. LEA. Then, your position, in substance, would be that these power companies, could not engage in interstate commerce unless there was equality as between the different communities?

Mr. DRAYTON. That is it exactly.

Mr. BULWINKLE. Again, I would ask you a question, because of the question I asked you yesterday. You are asking us to pass a bill to go into a new field. Now, there again, I ask you why the necessity, or how much necessity there is, for this bill.

Mr. DRAYTON. Well now, on that question, Mr. Bulwinkle, I was going to say that there always has to be a first case of this sort. The Shreveport case was the first case of that sort involving that question, that principle. We did not know—I was with the Interstate Commerce Commission for some years—and we did not really know that that power existed in the commission, to correct a situation like that, in the Shreveport case, and there was a good deal of doubt in the minds of some of the commissioners, I am sure, as to whether the Supreme Court would ever construe the third section of the act as giving them such powers. Now, that was the first case, and might then have been regarded as an isolated case of that sort.

We have always got to have a first case, and that was the first case of that sort, and the first case of this sort that comes up as an illustration is Cordele in Crisp County, Ga., involving this particular thing.

Now, since the Shreveport decision by the Supreme Court there have been a great many similar situations arise, and one chief function of the commission now is to correct just that thing, that unjust discrimination made by intrastate rates against interstate rates.

Mr. BULWINKLE. Then, up to the present time you only have one particular case in view, and that is the Georgia case?

Mr. DRAYTON. Well, that is all I have in mind.

I have been handed a memorandum here by Mr. Williams on that point. I do not know that I can take the time now to read it, but I think we will just embody that in this little memorandum, if you will permit us to file it later.

Mr. NELSON. Excuse me, but I want to ask as to this situation in Georgia. How does that apply now? How are the intrastate rates in Georgia interfering with interstate business?

Mr. DRAYTON. Well, the people of Cordele undertook to build that plant.

Mr. NELSON. I understand that, but now just tell me how the Georgia situation, the Georgia rates, intrastate rates affect interstate commerce? Do they do that?

Mr. DRAYTON. Well, I can not say that they do, except in this way.

Mr. NELSON. Well, what do they indicate, Mr. Drayton? That is, what do they do?

Mr. DRAYTON. Well, I was going to say this, that wherever there is a difference in rates such as was made by the Georgia Power Co.—they reduced those rates 35 per cent under the rates applied by the municipality——

Mr. NELSON. And increased the amount of electricity that came from another State into that State? They increased the interstate business?

Mr. DRAYTON. No, I do not think that they did.

Mr. NELSON. What?

Mr. DRAYTON. No, they did not, because they did not get the business even under the decreased rates.

Mr. NELSON. Then what effect did it have?

Mr. DRAYTON. For the reason that the citizens of Crisp County were so loyal to their municipal plant at the time, that notwithstanding that 35 per cent reduction, 96 per cent of the power continued to be sold by the municipal plant.

Mr. NELSON. Has the situation as regards the intrastate rates in Georgia affected interstate commerce in any way?

Mr. DRAYTON. Well, if they had continued that reduction of 35 per cent, assuming that their rates in general in Georgia, Alabama, and Mississippi, were reasonable rates, to that extent, a burden was imposed on the other communities, and other States.

Mr. NELSON. How?

Mr. DRAYTON. And to that extent also, there might have been created a situation, if they continued to maintain those reduced rates, in Crisp County, whereby locations of industries would have been controlled. That is, they would have located there to get those preferential rates. And so the State of Alabama and other States would have been affected, and that is interstate commerce, as I think the public utilities are commonly regarded as such that the Federal Government ought to regulate.

Mr. NELSON. You call that interstate commerce?

Mr. DRAYTON. Well, the transmission of electricity over State lines is interstate commerce and its sale affects interstate commerce; yes, sir.

Mr. BULWINKLE. I want to ask you this question: How did those rates as constructed compare, as made by that municipally owned plant, compare with the other rates of other municipal plants in Georgia?

Mr. DRAYTON. Well, I do not know as to that. Those rates were reduced 10 per cent by that municipal plant.

Mr. BULWINKLE. You just know that about it?

Mr. DRAYTON. That is all.

Mr. BULWINKLE. You have not made any study of the charges of any other municipally owned plant in Georgia?

Mr. DRAYTON. No; I have not. I did not investigate that. I think Mr. Williams did, and probably he can answer that better. I do not know of any.

The Federal Power Commission is already charged with the duty under the Federal water power act to see that licensees thereunder shall charge rates that shall be reasonable, nondiscriminatory, and just to the customer, it being declared that "all unreasonable, discriminatory, and unjust rates or services are hereby prohibited and declared to be unlawful."

This bill, therefore, will result in no fundamental change in the existing law, but is an amendment or supplement to section 20 intended to secure a result already in contemplation but not sufficiently defined. As I say, it merely provides a convenient automatic expedient for arriving at the same results.

Now, in the Shreveport case, the Supreme Court said:

> By virtue of the comprehensive terms of the grant of power in the Constitution, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interests by securing the freedom of interstate commercial intercourse from local control. (Citing Gibbons *v.* Ogden (9 Wheat. 1), and numerous other prior decisions dealing with that subject.)

Now, we have had cases before the Supreme Court—this is just argument by analogy—dealing with the hours of service act and the safety appliance act, where the contention was made that in part the employees were engaged in the performance of transportation duties connected with interstate commerce and also intrastate business, and in the safety-appliance cases it was contended that cars in part were used for intrastate as well as interstate commerce. The Supreme Court, however, in those cases said that wherever the duties were so commingled, relating to interstate and intrastate operations, it was competent for the Federal Government to deal with it.

Now, after discussing that class of cases the Supreme Court in the Shreveport case said this:

> While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount duty, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.

In a comparatively recent case, the Dayton-Goose Creek R. R. Co. *v.* United States (263 U. S., 456), the court said——

Mr. BULWINKLE. Will you pardon me again. I want to know something about the act aside from its constitutionality, or what the commission is authorized to do under it. I want to know something with regard to the machinery of the act. What additional costs

would be added to the United States Government if this bill passed and became a law?

Mr. DRAYTON. Well, except possibly the cost that Mr. Parker alluded to in connection with ascertaining values, which in our opinion would be unnecessary——

Mr. BULWINKLE. Well, what would that amount to if you did have to take valuations of the property, estimate the costs or values?

Mr. DRAYTON. Well, Heaven only knows.

Mr. BULWINKLE. I do not happen to be in heaven, but I do want to know.

Mr. DRAYTON. I do not know. I do not know that anybody has made a study of that. I do know that the figures given in connection with valuation work of the Interstate Commerce Commission was a very low estimate compared with what has been spent.

Mr. BULWINKLE. How many additional employees would have to be added to the Federal Power Commission, at once, if this bill were to become a law?

Mr. DRAYTON. I do not know, sir. Mr. Williams suggests to me that they would not have to have any. They take a ratio, and he says that it is a comparatively simple matter.

Mr. WILLIAMS. It is nothing like the Interstate Commerce Commission has had to do in connection with railroad valuations.

Mr. BULWINKLE. Well, have you had any difficulty in cases that you have gone into in the valuation of municipally owned plants down there?

Mr. WILLIAMS. No, sir.

Mr. BULWINKLE. And, you did not have to find out what they cost at all?

Mr. WILLIAMS. No, sir.

Mr. DRAYTON. You are asking engineering questions, Mr. Bulwinkle, that I can not answer, so I think I had better let Mr. Williams do it for me.

Mr. BULWINKLE. The Power Commission did not have to ascertain anything about costs of plants?

Mr. WILLIAMS. No, sir; and would not have to under this bill. Certainly, what is meant under this bill—to accomplish the purposes desired under this bill—would not require the commission to make any valuations.

Mr. BULWINKLE. Well, how are they going to fix rates then?

Mr. WILLIAMS. They will simply have to allocate to any given community a particular part of an already established total, that established total being the amount reported by it to the State regulatory agency, or if the value for rate making had been made by a more authoritative source, by that. For instance, there have already been cases that the Supreme Court has passed on where they would just take out a proportional allocation to determine value. In other words, they know the number of kilowatts they did use in a certain community, and they know the total number of kilowatts used in the State, and they have the total value, that they keep as a report to the State regulatory agency for the whole State and upon which their rate structure has been based and determined, and so all in the world that they would have to do would be to proportion that out for the particular community and in five minutes for any town

they can get the allocated value by dividing the number of kilowatts in that town by the total kilowatts, multiplied by the total values already established and of public record.

Mr. BULWINKLE. Then your opinion is that under no circumstances would there be any additional costs under this act.

Mr. WILLIAMS. There would not be. In my opinion there would be a tendency to simplify and make the costs and the work a whole lot less. As a matter of fact, the fact that they could keep that sort of test as a yardstick in that way would keep the necessity for some of the work that they do now from being done. They wouldn't attempt to be as "unruly," to use Mr. Roosevelt's expression.

Mr. NELSON. Well, just as a matter of information, I want to know, assuming that you had Federal licensees in Tennessee generating power, and they sold it to a transmission line which simply carried it down and sold it in Georgia, does your commission have any jurisdiction over the distributing company in Georgia, and they sell their power?

Mr. DRAYTON. We would like to have that regulated.

Mr. NELSON. I say, do you have it?

Mr. DRAYTON. I think that you are under the impression that I represent the commission, Mr. Nelson. I do not. I represent the proponents of the bill, not the commission.

Under this bill we merely want to prevent discriminations which are unjust and which are not justified by a difference in cost of performing the service considered as a completed whole, or unit.

Mr. NELSON. Well now, suppose that this Federal licensee is transmitting power into Georgia, you have got a right under your present powers of regulation, to exercise authority over that Federal licensee, haven't you?

Mr. DRAYTON. Yes; that is true, as to the licensee.

Mr. NELSON. Do you claim now that you have got any license or any power to fix the price at which they shall sell?

Mr. DRAYTON. Well, I think they have a right to govern the conditions under which that licensee does interstate business.

Mr. NELSON. Now, let us suppose that this licensee takes power across the State line and sells it to a distributing company in Georgia. Have you at the present time any authority over that distributing company in Georgia?

Mr. DRAYTON. I do not think so, under the present act, and it may be necessary to go to the Georgia Legislature, if there is any necessity for it to be regulated, to attempt that regulation.

Mr. NELSON. Well, if this act were passed, do you think that you would have the power to go into Georgia and go to the company that was distributing, simply buying from this Federal licensee, which has bought electricity that has come across the line; do you think then that you would have the right to tell that distributing company at what price they were to sell to consumers in Georgia, who were customers of their distributing lines?

Mr. DRAYTON. I do not think so, unless there was an affiliate affected, under the definition of this bill.

Mr. NELSON. Well, if you can not do that, what good will this law do?

Mr. DRAYTON. Well, it will do this good, that these distributors of power are licensees to some extent now, and are conducting the whole business from beyond the State line and in many cases——

Mr. NELSON (interposing). Well then this law only applies to Federal licensees that are in the State, where the interstate commerce ends.

Mr. DRAYTON. Well, the present law does. We hope to broaden it.

Mr. NELSON. I am talking about this law.

Mr. DRAYTON. You mean this bill. It is not a law yet.

Mr. NELSON. This bill here. Would you be able to say to the distributing company that is buying this power, dictate to them, as to what their rates would be, and as to whether existing rates are reasonable?

Mr. DRAYTON. Well, if there was an affiliate.

Mr. NELSON. What do you mean by an affiliate? I am stating a case simply about the power that was generated by a Federal licensee. That would be the usual case.

Mr. DRAYTON. They do not make their rates.

Mr. NELSON. You could not then do that; you do not do it now, and you could not if this bill were passed, could you?

Mr. DRAYTON. No; I do not think we could with separate independent corporations.

Mr. NELSON. No.

Mr. DRAYTON. In the State of Georgia, unless the Georgia Legislature could reach it, by its own law, I do not think that we could reach it.

Mr. NELSON. Well, is that not the proper way, and the way in which they would have to be reached, for the people of Georgia, through their own representatives, to make their own laws and their own regulations?

Mr. DRAYTON. Well, I think there would still be the general class of discriminations, not to the same extent, nor in the same way, because the service is different, but to the extent necessary those discriminations should be controlled by the doctrine announced in the Shreveport case.

Mr. NELSON. Well, I do not object to you fixing rates on transportation, where you have got the authority, but I am wondering how you are going to fix prices. That is still bothering me. Congress can, under the Shreveport case, fix those rates, and I will agree with you on that, but when it comes to fixing prices, I do not know whether they can or not. I do not know.

Mr. WILLIAMS. I think that we have gotten a little away from the subject, somehow or other. There is nothing in this bill that provides, or under which you could say that there is a fixing of rates or prices, either intrastate, or interstate. All that is contemplated by this bill is to declare unlawful a system of rates in so far as they may be discriminatory——

Mr. NELSON. Well, what is that provision on page 2, which reads that the commission shall have power to prescribe the rate or rates thereafter to be charged?

Mr. WILLIAMS (continuing). For this reason.

Mr. NELSON. I am talking about rates.

Mr. WILLIAMS (interposing). But——

Mr. NELSON. Wait a minute. I understood you to say that this has nothing to do with rates.

Mr. WILLIAMS. This has to do with a rate that has already been fixed and——

Mr. NELSON. By whom?

Mr. WILLIAMS. Or that has been determined——

Mr. NELSON. By whom?

Mr. WILLIAMS. By the State regulatory agency.

Mr. NELSON (continuing). This says——

Mr. WILLIAMS (continuing). All that is determined is whether or not, under those rates, there is a difference in cost, the costs for like services, and when they determine that—and the burden of proof would be on the company—the Federal commission would have had nothing to do with the fixing of these rates; they just say that this law is being violated, and that there is discrimination and that the rates must be adjusted so no more difference shall exist than the percentage difference in cost.

Mr. NELSON. We come right up to that point, and the commission——

Mr. WILLIAMS. I may say that that is all that the commission can do.

Mr. NELSON. Is what?

Mr. WILLIAMS. Is to do that.

Mr. NELSON. Prescribe rates?

Mr. WILLIAMS. To determine whether that system of rates is unlawful.

Mr. NELSON. And, suppose that it is?

Mr. WILLIAMS. Well, suppose that it is, then they do not make——

Mr. NELSON. Then, what do they do?

Mr. WILLIAMS. Then, they do not make any level of rates at all.

Mr. NELSON. What do they do?

Mr. WILLIAMS. They simply say that this difference in rates between any two communities is such as to cause a discrimination. In other words, it might be entirely too high, the whole system, or it might be too low from standpoint or reasonableness of the rates in concerned, per se.

They would have nothing to do with it except to outlaw the discrimination.

Mr. NELSON. Why do you not write that into this bill?

Mr. WILLIAMS. If that is not clear, I think that is a very good point. I mean by that, I think it is very necessary to make it clear.

Mr. NELSON. Have you a copy of the bill?

Mr. DRAYTON. Right here.

Mr. NELSON. Have you read it?

Mr. DRAYTON. Yes.

Mr. BULWINKLE. The last bill, No. 1456.

Mr. WILLIAMS. I think that it is the same as 11675, as revised.

Mr. NELSON. But, this says that the commission shall have power to prescribe rates, or the rates thereafter to be charged. Does it say that? I say, does it say that?

Mr. WILLIAMS. You have just read that language. Of course it does.

Mr. NELSON. Yes.

Mr. WILLIAMS. But, I have tried to show you that the purpose was this, not to fix the rate, but to declare that type of discrimination unlawful. The Federal Commission would have nothing to do with the general level or the reasonableness of that rate, in the sense that they——

Mr. NELSON (interposing). That may be the intent.

Mr. WILLIAMS (continuing). Now regulate rates, if this were passed by Congress.

Mr. NELSON. But this is what the bill says.

Mr. HUDDLESTON. Mr. Nelson, would it be agreeable to let him, Mr. Drayton, finish, and then ask questions?

Mr. NELSON. Yes.

Mr. HUDDLESTON. Proceed, Mr. Drayton.

Mr. DRAYTON. Mr. Chairman, this discussion has gone beyond what I had contemplated in my notes, and I find that they are of little value as a guide now. I do not want to take up any more of your time than I can avoid doing, and I was going to suggest that, in view of these questions, if I could have leave to put in the record and add to my remarks briefly, the points that I think are pertinent here, I would be willing to surrender the remainder of my time.

The CHAIRMAN. I do not think that there would be any objection to that.

Mr. DRAYTON. I will not extend the record any more than is necessary, but you seem to be a little impatient to get through with this, and I will be glad, if I may do that.

The CHAIRMAN. Very well.

(In accordance with permission granted as above the following statement is submitted:)

In the light of the discussion at the hearing, particularly the testimony of Mr. Benton, representing the national association of railroad and public utility commissions, it is necessary to make clear our attitude on the amendments to H. R. 14516 suggested by Mr. Shallenberger to paragraph (2) and by adding a new paragraph (9).

We did not intend by these amendments to withhold from the Federal Power Commission jurisdiction to make such order as would effectually cure unjust discriminations in rates, whether arising from a difference between the rates for two interstate services, or from a difference in rates applying within a State, one the one hand, and rates applying to electrical energy transmitted and sold interstate, on the other. If in any such case there were no way of reconciling the two rates except by prescribing the reasonable level of the interstate rates to be applied, that necessarily would be the function of the Federal Commission. Then, under the doctrine of the Shreveport case, an order condemning the discrimination as unjust would, in some cases, require that the intrastate rate conform to the interstate rate. Unless one "parent" company, as defined in paragraph (7) (G) of the bill, were responsible for the interstate and also for the intrastate services, of course there would be no such common control as would make the difference an unjust discrimination subject to the remedial order of the Federal Commission.

If, therefore, the amendments proposed by Mr. Shallenberger to H. R. 14516 are to be construed as divesting the Federal Commission of any authority essential to the correction of unjust discrimination in the class of cases sought to be covered under the doctrine of the Shreveport case, then the proponents of the bill disavow such amendments and ask that H. R. 14516 be considered in its present form. We believe the bill to be necessary in the public interest as affording the only means of reaching an evil which can not be dealt with adequately by the individual States.

STATEMENT OF OSWALD RYAN, GENERAL COUNSEL, FEDERAL POWER COMMISSION

The CHAIRMAN. Give your full name to the reporter.

Mr. RYAN. My name is Oswald Ryan. I am general counsel of the Federal Power Commission.

Mr. Chairman and gentlemen, I wish to say at the outset by way of explanation of my relation to this hearing, that I do not appear as an advocate of this bill, or as a sponsor of this bill. I am advised that I am here at the request of your committee as the general counsel of the Federal Power Commission, for the purpose of giving the committee my views as to the relation which this proposed amendment may bear to the Federal water power act, as it now exists. I do not want anything I may say to be construed either as hostility to or as advocacy of the measure.

I may say at the outset that the measure, in my judgment, in its purpose, harmonizes with and fits into the general purpose, one of the general purposes, at least, of the Federal water power act.

That act, in section 20—members of the committee are no doubt familiar with the section—prohibits the charging of discriminatory or unreasonable rates, on the part of licensees of the commission, their subsidiaries, and customers, where any part of the energy enters into interstate commerce, and where, under the provisions of the act, there is Federal jurisdiction.

Section 19 of the act deals with intrastate rates, and, while it does not provide in express language that the rates shall be nondiscriminatory, and reasonable, nevertheless, it implies, in its regulatory language, that that is the purpose back of this provision.

Let me say, that one of the main purposes of the Federal power act, is to provide nondiscriminatory and reasonable rates for the consumers of power.

Therefore, if the purpose of this bill, as thus appears, is to provide the machinery for more fully protecting the rates in one community against discriminatory rates on the part of the same company, or its affiliates, in another community, then it seems to me that the purpose of the proposed amendment fits into and harmonizes with the purpose of the Federal water power act.

Mr. NELSON. Now, just a minute. May I ask what weakness there is in the present law?

Mr. RYAN. I do not want to be placed in the position of speaking of any weakness in the present law, in that connection, Mr. Nelson.

Mr. NELSON. What is that part of the present law that you think it desirable to be supplemented? You have given me the impression that there is some weakness there.

Mr. RYAN. No, I am merely making the statement——

Mr. NELSON (interposing). In the matter of preventing discriminatory rates.

Mr. RYAN. I would answer in this way, that the present law is restricted in the scope of its jurisdiction.

Mr. NELSON. Well now, that does not do me any good, to tell me that, or to make that general statement.

Is it that this discriminatory provision applies only in interstate transactions?

Mr. RYAN. No; but it is limited to licensees of the Federal Power Commission, and I understand that a large part of the field is outside of the jurisdiction of the commission. I was coming to that.

Mr. NELSON. Under the present law, if a Federal licensee transports or transmits electricity to another State, under the present law, have you the power to say that there shall be no discrimination in the distribution of that power in the other State?

Mr. RYAN. I understand that there is no power on the part of this commission, under such circumstances, in any State, where there is a regulatory commission.

Mr. NELSON. Well, that is what I want.

Mr. RYAN. Now, Mr. Nelson; you raised the point there which I was coming to, and that is the important departure in this amendment from the Federal water power act, and I conceive that it would have the effect of extending the jurisdiction of the Federal Power Commission. The present act gives the commission jurisdiction over licensees and their customers where the business is intrastate and other licensees, their subsidiaries and customers where the business is interstate. You will note that the commission's jurisdiction is contractual in the first instance, while in the latter case the Federal control over interstate commerce is the basis. But the jurisdiction over persons does not go beyond the licensees, their subsidiaries, and customers, or purchasers of power.

Now, this proposed amendment greatly enlarges that jurisdiction. Just to call the committee's attention to the language of the bill—I hope that my copy is a correct copy—it starts out on page 1 by saying that "it shall be unlawful for any licensee hereunder," now, going to page 2—

To sell or offer for sale electrical energy in one community at a rate or rates higher than the rates at which electrical energy is sold or offered for sale in another community by the seller or a person affiliated with the seller——

Mr. NELSON. That does not mean within the same State; that means just what it says.

Mr. RYAN. Yes, exactly so—

Unless there is a difference in the cost (as referred to under the provisions of subdivision (7) (B)) to furnish a like service in the said communities; and the rate or rates in the community having the higher cost shall not exceed the rate or rates for a like service in the community having the lower cost by a greater percentage than the percentage difference in said cost to furnish the service, except as hereinafter provided.

Mr. NELSON. Now, that does not consider State lines at all. That is a community within one State, or another.

Mr. RYAN. That does not consider State lines.

Mr. NELSON. No.

Mr. RYAN. And, as I understand it, the communities involved in this bill may be intrastate or they may be in different States.

Now, as far as that provision of the bill just quoted is concerned, it is largely merely declaratory of the present law.

Mr. HUDDLESTON. What is the number of the bill that you are reading from?

Mr. RYAN. 11675.

Mr. NELSON. So, that covers the matter of discrimination, not only in the same State, but maybe in different States, or contiguous States.

Mr. RYAN. In the same State and in different States, yes. Now, the language quoted is merely a declaration, as I understand it, of the present law.

Mr. HUDDLESTON. That jurisdiction is based upon the license system?

Mr. RYAN. That jurisdiction in the present act is based upon the license system, and its basis, if it were within the State, would be contractual; if the business were in different States, it would be primarily under the commerce clause of the Constitution.

Mr. HUDDLESTON. It would be contractual also, in another State. It does not seem to relate to the commerce clause.

Mr. RYAN. I thought you referred, Mr. Huddleston, to the regulation of interstate transmission.

Mr. HUDDLESTON. Whether intrastate or interstate, it is nevertheless contractual. It is contractual, because it is an action by license.

Mr. RYAN. It is incorporated in the license of contract. That is right. But the jurisdiction over subsidiaries and customers must rest upon the commerce clause of the Constitution. The license is the method, not the power.

Mr. BECK. Right there, Mr. Ryan. Can you refer me to any decision of the Supreme Court in which the jurisdiction to license by the Federal Power Commission has been sustained?

Mr. RYAN. You mean, of a license involving regulatory functions?

Mr. BECK. No; the license to generate power, water power.

Mr. RYAN. One of the earlier cases is the Chandler-Dunbar case.

Mr. BECK. Which?

Mr. RYAN. The Chandler-Dunbar case.

Mr. BECK. The Chandler-Dunbar case was decided long before the Federal Water Power Commission was created. Am I right in that?

Mr. RYAN. That is true.

Mr. BECK. The Chandler-Dunbar case is a case where it was held, if I recall it correctly, and I think I do, that the power of the United States Government over navigable waters, as an incident to the maintenance of navigable conditions, included the power to utilize, or at least to regulate, the generating of power of such navigable streams.

Mr. RYAN. That is right.

Mr. BECK. Now, as I understand it, the contention now is, since the Federal water power commission act was passed, that under that power the Federal Water Power Commission can determine who, by the license system, shall or shall not utilize water power to generate electricity.

Mr. RYAN. Exactly.

Mr. BECK. Wherever, or whenever, the Government is in fact engaged in any development of water power.

Mr. RYAN. Aside from its proprietary jurisdiction?

Mr. BECK. I beg your pardon?

Mr. RYAN. I am asking if you mean aside from its proprietary jurisdiction over the public lands?

Mr. BECK. Oh, yes; yes; that is another question.

Mr. RYAN. You are limiting it to navigable streams?

Mr. BECK. I do not refer to proprietary interests. I am not asking about proprietary interests.

I was very much interested, as Solicitor General, in the creating of the water power act, and I have lost all track of the development of the law upon it, and I thought you could tell me how far the Supreme Court had limited or extended this power, which is certainly, primarily, that of improving the navigability of navigable streams. Outside of that power, I do not believe it has been extended to take in under its jurisdiction the regulation of all power propositions to which navigable streams could be put.

Mr. RYAN. I think, Mr. Beck, that the question which you raise has not been definitely answered by the Supreme Court, and that it is the question which is now pending in the New River case, and the point of view, which has been presented by the plaintiff in that case through Mr. Baker, raises exactly the same question as to whether or not all of these regulatory functions such as rate making, security supervision, and the like are properly incidental to the power of Congress over navigation.

That question has not yet been answered by the Supreme Court.

Mr. BECK. Just one further question: What is the status of that New River case?

Mr. RYAN. It now stands upon the motion of the Government to dismiss the bill of complaint. The arguments were heard at Norfolk, last summer; a three-day reargument was heard last week before the same court, sitting at Alexandria, and the court has promised a decision on the case within the next few days.

Mr. BECK. It is not yet in the Supreme Court?

Mr. RYAN. It is not yet in the Supreme Court. It is in the District Court for the Western District of Virginia.

Mr. BECK. I suppose that the contention of the plaintiff is that it is not a juridical question?

Mr. RYAN. Our contention is that the complaint fails to set up facts constituting a cause of action for the reason that the court can take judicial notice of the fact tha New River is navigable, and if navigable, there can be no grounds, no cloud upon the title to the plaintiff's property, and no jurisdiction over the defendant under section 57 of the code.

The company's theory was that New River was a nonnavigable stream, and——

Mr. HOCH. May I follow that just a little further. In setting up the Federal water power act, there was involved the question of whether the Federal Government has the right to deny the use of interstate commerce except upon certain conditions.

Mr. RYAN. No, I should not say that there is any question of the denial to any person of a right to engage in interstate commerce. I think, so far as the water power act is concerned, the question was the relation of the Government to navigation, the improvement of navigable waterways, and water power.

Mr. HOCH. The preceding witness, in answer to a question by Mr. Nelson, stated that Federal jurisdiction rested partly at least on the power to license the use of interstate commerce.

Well, the proposal here is not to license anybody to enter into interstate commerce, or engage in the business of transmission and sale of electric energy. It does not set up any license system.

So, if Federal jurisdiction is to be maintained, on that theory, you would have to provide, to the language of this bill on page 2, that "any corporation engaged in transmitting or receiving electrical energy across any State line" shall be subject to the license system. In other words, we might say to them, before you shall be permitted to transmit or receive electrical energy across a State boundry, you shall take out a license, and one condition of that license shall be that you will not establish discriminatory rates between communities.

Mr. RYAN. I do not regard it quite that way, Mr. Hoch. This bill does not provide for licensing of any person who is brought within its jurisdiction. It is not a license system.

Mr. HOCH. Do you not think that that is a pretty broad power for the Federal Government to attempt to exercise, to permit the use of interstate commerce, or an agency of interstate commerce, only upon certain conditions?

Mr. RYAN. That question—my answer to that question, general in nature as it is—would be a horseback opinion.

The constitutional limitations on Congress, in the matter of regulating interstate transmission, or any agency or instrumetality of interstate commerce, would require very careful consideration and study.

Mr. HOCH. Well, that is one of the preliminary questions that this committee, and Congress, would have to face, if it attempted to exercise that power, in the way this bill proposes, of Federal jurisdiction, would it not?

Mr. RYAN. As I understand, Mr. Hoch, the constitutional basis of this amendment for the extension of Federal jurisdiction, is that set forth by the court in the Shreveport case.

The bill, you will note, in the first section, in section 20a, upon the first page, expressly says, that—

> If such action tends to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, for any corporation engaged in transmitting or receiving electrical energy across any State boundary, or for any person affiliated with such corporation, or for any person purchasing power from any such licensee or corporation or from any person affiliated with such licensee or corporatin for sale and distribution or use in public service.

It is my judgment, that the commission, if it undertook to exercise that jurisdiction over one of these discrimination cases, proposed to be reached by this amendment, it would have to make a finding that interstate commerce had been discriminated against or burdened, and such finding would have to precede any other finding and determination of the commission.

Mr. HOCH. In other words, to make concrete application, the Crisp County case, Georgia, to which reference has been made, the commission would have to find that the rate in Crisp County, charged by the Georgia Power Co., was so low that it reduced the revenues of the Georgia Power Co. to an extent that, in order to make up

those revenues, they would have to impose additional burdens on people elsewhere.

Mr. RYAN. In substance, the finding would have to be that, or some finding that would establish a discrimination against interstate commerce or foreign commerce.

Mr. HOCH. How could it be determined if it was unreasonable except as a matter of revenue? So, that would be the only way it could be reached under the law. The company could only do business, permanently do business, at a profit. If it did business at one place below cost, or below a reasonable profit, it would have to do business elsewhere, somewhere else, at a rate higher than a reasonable rate, in order to make up that deficit. That would be the only theory, would it not, on which that power could be exercised, on a finding of discrimination.

Mr. RYAN. Yes. I can not see any other basis for Federal jurisdiction, in a case like that, except under the Shreveport doctrine.

Mr. WILLIAMS. That company happens to be licensed also.

Mr. BECK. Following up Mr. Hoch's, my colleague's question, and a like analysis, is it not your logical contention that the Government of the United States has the power to license those commodities engaged in interstate commerce? And, of course, there are those that may not.

Mr. RYAN. To my knowledge, that question has never been determined by the Supreme Court.

Mr. BECK. No; I am asking you.

Mr. RYAN. Whether or not there can be a licensing of instrumentalities, like power companies, in interstate commerce, is an interesting question.

Mr. BECK. I am not referring to power companies now; but if we pass this proposed legislation, upon the commerce power of the Federal Government, is it not your contention then that the Government has the power, sometimes stated to be preliminary, to say who shall engage in interstate commerce, and who shall not? And, if so, is there any decision that in any way justifies the power of the Federal Government to determine who shall engage in interstate commerce?

Mr. RYAN. I would not want to answer that question offhand, in view of its general nature.

Mr. BECK. Well, of course, if the answer is in the affirmative, then the liberties of the States and the peoples of the States, are practically gone, in the economic shuffle. If the Federal Government is to say as to all of the useful and harmless commodities of commerce, who will engage in interstate, by getting a license from the Federal Government, then the end of the Government, as we supposed it was, has come. Is that not true?

Mr. RYAN. That may be so.

Mr. BECK. Now, is there any——

Mr. NELSON (interposing). This goes further than that. This goes so far as to fix the price at which they will sell, and in addition, to whom they will sell.

Mr. RYAN. That, of course, is incident to the licensing power.

Mr. BECK. Now, I can understand—I do not want to take up your time or interrupt your argument—I can understand the contention that it is to preserve the power of the Federal Government over navigable streams, and that a great deal can be done as an incident

of that power; if you base it on that ground, I can understand it. But, if you base it on the ground that it does not extend to that, but that this is interstate commerce, and that the Federal Government has the right to say that no one shall engage in it without a license from a Government bureau, then you have reached a point of centralization beyond anything anyone has ever dreamed of.

Mr. HUDDLESTON. May I suggest to my Brother Beck that the requirement for the interstate commerce act of a certificate of convenience and necessity before a railroad can be built involves that very thing.

Mr. BECK. Yes.

Mr. HUDDLESTON. Because the act provides that no one shall engage in interstate rail transportation without that certificate, which is, in effect, a license. If that be a legal and proper exercise of power, under the commerce clause, then we have it there.

Mr. BECK. There is, of course, a distinction. That is what I am trying to develop out of the witness. There is a clear distinction between the instrumentality of commerce endowed with the franchise of the public and the ordinary avocations of life, like selling shoes, or selling wheat.

Mr. HUDDLESTON. Of course. The distinction is this, as to the regulation of commerce: The Supreme Court has held that you can not prohibit commerce, if it be of a legitimate character. You may regulate it, and the whole question is, whether the requirement of a license is a regulation.

Mr. BECK. You know, the Supreme Court, in a very large number of cases, has held that certain things do not come under the jurisdiction of the Federal Government, but it is to this extent applicable, while the clause under the fourteenth amendment, the same principle is applicable to the fifth amendment; but in Oklahoma they passed a law to the effect that nobody could engage in the ice business without getting a license from the corporation commission. The Supreme Court very promptly held that invalid.

Mr. RYAN. On the ground——

Mr. BECK. They held it invalid on the ground that it violated the fundamental liberties guaranteed by the fourteenth amendment; that the ice business was not one that justified that.

Now, the distinction pointed out by my Brother Huddleston is an apt one, and my views are that the generation of electrical power stands on a different ground from the making of ice.

Mr. RYAN. It is a public utility, public service company and its business is affected with a public interest.

Mr. BECK. And there may be a distinction that justifies this legislation.

The thought I had in the Oklahoma ice case, the question was whether or not the making of ice or distribution or sale and distribution of ice was a public service, and while the legislature had undertaken to establish it as a public utility, yet the Supreme Court refused to recognize that as a fair classification.

Mr. NELSON. I want to ask you one question: As I understand it, this discriminatory rate clause, as it now stands, applies to everyone who is licensed to generate power in one State for sale in another or to be there distributed by distributing companies, but if in the

latter State there is a public-utility body, your commission would have nothing to do with the rates.

Mr. RYAN. We would have nothing to do with the rates if there is an empowered public utility commission.

Mr. NELSON. You see, it is generated in Tennessee.

Mr. RYAN. Yes.

Mr. NELSON. And sold across the line in Georgia to a public utility company that distributes it there to their customers. Now, under the present law, would you have anything to do with the rates in Georgia, which, as you say, has a public utilities commission for the purpose of regulating rates?

Mr. RYAN. Absolutely not.

Mr. NELSON. And that is true of all States where they have regulatory bodies that take care of the situation?

Mr. RYAN. It is true.

Mr. NELSON. Well, under this law you would have, would you not?

Mr. RYAN. That brings me to my next point in the matter of enlargement of jurisdiction, Mr. Nelson.

Mr. NELSON. Well, you would have, would you not?

Mr. RYAN. Yes. There is no provision in this amendment, as I read it, to exclude Federal jurisdiction where there are State agencies empowered with regulatory functions.

Mr. NELSON. Yes; but you just said that you did not have any jurisdiction in any of those States under those conditions and you apparently have assumed up to this time that you do not have—at least, you have not attempted to exercise it. Is that right?

Mr. RYAN. I am speaking now of the present law, without the amendment.

Mr. NELSON. That is what I am speaking of.

Mr. RYAN. Yes; we have no jurisdiction in States which have regulatory agencies empowered to perform regulatory functions.

Mr. NELSON. Now, under this law you might come in and fix what you consider to be a just rate.

Mr. RYAN. Under this law, if it creates the power, as you contend, to prescribe the rate——

Mr. NELSON (interposing). I do not contend anything about it. I do not know anything about this law. What I am after is an explanation of it. All I know is what is stated here. It says—

> And in any such case the commission shall have power to prescribe the rate or rates thereafter to be charged.

Mr. WILLIAMS. You never finished the paragraph.

Mr. SHALLENBERGER. You do not read all of it.

Mr. WILLIAMS. You never finished the paragraph; read all of it.

Mr. NELSON. I understand that, but that is what is stated there.

Mr. SHALLENBERGER. You stopped before you completed the quotation.

Mr. RYAN. The point Mr. Nelson makes, to make a long story short, the point is this, that whether the act excludes the Federal Government——

Mr. NELSON. Yes.

Mr. RYAN. In those States, where they have State commissions——

Mr. NELSON (interposing). Exactly.

Mr. RYAN. It does not, under this amendment.

Mr. NELSON. That is what I was trying to say.

Mr. RYAN. Yes; I agree with you that it does not.

Mr. NELSON. So, while it is recognized that the State has the right to make the rates and regulate them, there is nothing in this act which says that the Federal Government may not exercise that same jurisdiction.

Mr. RYAN. There is nothing in this amendment, as I understand it, to exclude Federal jurisdiction where there are State agencies with regulatory powers.

Mr. NELSON. Now, going back again to the power of the Federal Government under certain conditions to come in and fix rates, they can do it then——

Mr. SHALLENBERGER. And remove the unlawful element.

Mr. NELSON. Yes.

Mr. SHALLENBERGER. Remove that from interstate commerce.

Mr. NELSON. It gives the Federal Government that power.

Mr. SHALLENBERGER. Yes.

Mr. NELSON. To interfere.

Mr. WILLIAMS. What power?

Mr. NELSON. To fix the rates for power.

Mr. RYAN. The point that Mr. Nelson has asked about, and which I want to make is, that it is not the purpose of Mr. Williams and those who are sponsoring this amendment——

Mr. NELSON. But, that necessarily is the result.

Mr. RYAN. To change the present rule of the Federal water power act regarding the exclusion of Federal jurisdiction, but I myself believe that this language does not make that purpose clear, and I think that matter could very well be clarified, perhaps by an amendment which would provide, as the present water power act provides, that where there is a State regulatory agency, with regulatory jurisdiction, the Federal jurisdiction over rate making is excluded.

Mr. SHALLENBERGER. Mr. Ryan, may I ask you, in connection with the question that has been raised here, continually, whether or not additional power is being given or granted in this bill? As I understand the law now you have practically this power, so far as it applies.

Mr. RYAN. Yes, sir.

Mr. SHALLENBERGER. Now, this bill seeks to include only corporations engaged in transmitting and receiving electricity, electric power, and so forth between States. In other words, it extends the power of the board to any corporation doing interstate business. That is the additional power or legislation.

Mr. RYAN. It appears to be that.

Mr. SHALLENBERGER. Now, the bill seeks to give the power commission authority to correct any abuse of power by this corporation. The power to do so is contained in the language down here in that part of the bill that Mr. Nelson referred to, which reads:

> And in any such case the commission shall have power to prescribe the rate or rates thereafter to be charged, in such manner as, in its judgment, will remove the unlawful element and such advantage, preference, prejudice, or discrimination.

In other words, that is all that is contained in this bill, so far as rates are concerned, that rates shall be adjusted so as to be non-discriminatory. Is not that the purpose of it?

Mr. RYAN. That is what the bill says, as I read it.

Mr. SHALLENBERGER. That is all that this bill does. It establishes two fundamental principles: First control over interstate corporations that the commission does not have power over now, and secondly, prohibits discrimination in rates. It does not give any other powers.

Mr. RYAN. That is my understanding of the language.

Mr. PARKER. Mr. Ryan, in connection with Governor Shallenberger's question, you do not have power now over the licensee, do you, to go in and interfere at all with the price the distributor pays?

Mr. RYAN. That is true, Mr. Parker.

Mr. PARKER. Then, it enlarges your present powers, over the companies, over which now you have no jurisdiction at all?

Mr. SHALLENBERGER. In the matter of power, I might say, Mr. Parker, that this applies, this general provision, to licensees.

Mr. PARKER. Yes; it enlarges your present power over the licensees.

Mr. SHALLENBERGER. It only gives them jurisdiction over those matters in order to prevent discrimination.

Mr. RYAN. Let me qualify my statement. Our present power under the act is over the licensee, subsidiaries, and customers.

Mr. PARKER. But, I am speaking of the company that is not a subsidiary, where they sell to a trolley company, for instance, and has nothing to do with that.

Mr. RYAN. Federal regulatory power, under the present act, is excluded where a State agency is empowered and where the States concerned have agreed through their properly constituted authorities.

Mr. PARKER. Yes.

Mr. RYAN. Now, it seems to me that, in reading this amendment, that this amendment does not make clear that there will not be a conflict between the State and Federal jurisdictions, and perhaps that may be a reason for clarifying that provision, and making it clear that, as in the present law, there shall be no Federal jurisdiction where the States have properly constituted agencies.

Mr. SHALLENBERGER. Well, do you not feel that there is no conflict here, any more than there is between State railway commissions, and the Interstate Commerce Commission? In a case where you thought discriminatory rates were in effect, and the State body was not correcting them, do you think that the national commission should have the right to interfere in that case?

Mr. RYAN. Well, that would be a question of policy for Congress, whether it wanted to enter into that matter, and go into a State and do something which the State had failed to do.

Mr. SHALLENBERGER. Do you think that this bill gives power to do that, where the State commission refuses to act?

Mr. RYAN. It may do so, Governor Shallenberger, in view of the fact, as I have said, that it is not clear in this bill that Federal jurisdiction is excluded where State regulatory commissions have been empowered.

Mr. SHALLENBERGER. Do you think that the Federal agency ought to have that power, if this law is to be effective? Is it necessaary to lodge that power in the Federal regulatory body, and make the judgment of the Federal body superior to that of the State commission where the State's action interfered with interstate commerce?

Mr. RYAN. Where there is an interference with interstate commerce; yes.

I think that I have brought out the point, that this enlarges the jurisdiction of the commission, and that it is not clear, from the language of the amendment, that Federal jurisdiction is excluded where there is a State regulatory agency. In other words, there is a departure there from the rule of the present water power act.

With those two observations, I think that I have said everything that I intended to say on the question of this amendment.

I want to repeat that while the Federal Power Commission is in sympathy with the purpose of the act, to insure nondiscriminatory rates, nevertheless has not made a study of the machinery of the proposed amendment, and does not undertake to say that these particular provisions would be the best provisions for the accomplishment of the purposes for which they are intended. But the purpose, the main purpose of the act, certainly is in harmony with the purpose of the Federal water power act, to insure nondiscriminatory rates.

The CHAIRMAN. Mr. Nelson, you wanted to ask a question?

Mr. NELSON. May I ask one question?

Mr. RYAN. Yes.

Mr. NELSON. Perhaps this is more or less academic, but as applied to the act, there is nothing under the commerce clause of the Constitution that gives you a right to regulate the transportation between States that you can extend to the fixing of prices in the distribution of commodities, or to the fixing of the price on commodities before you accept them for transportation.

Mr. RYAN. I think that question should be answered in the light of the peculiar nature of electrical energy, as distinguished from other commodities, in interstate commerce, and——

Mr. NELSON (interposing). Do you think that under the interstate commerce clause of the Constitution, that if a generating agency of one State delivers electrical power to be distributed in another State, to a transportation company; do you think, under those conditions, that you could say at what price they will have to sell that power in that State?

Mr. RYAN. Now, you are speaking of interstate wholesale distribution?

Mr. NELSON. I am not speaking of the charges on transportation, or of its regulation, nor of the transportation charges, but only about the price at which it shall be distributed, or the price at which it is sold.

Mr. RYAN. Well, at any rate, the Supreme Court did undertake to say that indirectly in the Attleboro case.

Mr. NELSON. I am not talking about regulation of transportation; I am talking about regulation of the price at which the energy may be sold.

Mr. RYAN. They have never passed directly on that. The court has never passed on that, upon the question of the regulation of the price. It passed upon the question——

Mr. NELSON. I asked you what your opinion was on it.

Mr. RYAN. My opinion.

Mr. NELSON. Yes. Do you think that, under the commerce clause, we can go so far as to fix the price—not regulate transportation—but regulate the prices?

Mr. RYAN. Yes; I think, Mr. Nelson, that in view of the peculiar nature of electric energy, as distinguished from commodities, in interstate commerce, that any effective regulation of interstate transmission, probably would involve, necessarily, the fixing of price. Whether or not the court will be willing to go that far, I do not know.

Mr. NELSON. Then, that would apply to the natural gas prices, natural gas pipe lines. They could fix the price at which that leaves the State of origin, and the price at which it is distributed throughout the country.

Mr. RYAN. I am not so sure that there is an analogy between electricity and gas. If the analogy is clear, then the jurisdiction of the Federal Government has been greatly curtailed recently by the East Ohio Gas Co. case.

Mr. NELSON. And, it is your opinion we can fix the price, under the transportation clause?

Mr. RYAN. Will you say that again, please?

Mr. NELSON. It is your opinion that we can fix the price, under the transportation clause, not only fix rates, and rules for transportation, but fix the prices of distribution.

Mr. RYAN. Under the present transportation law, I would not say that that was so.

Mr. NELSON. Under the Constitution?

Mr. RYAN. Under the Constitution?

Mr. NELSON. Yes.

Mr. RYAN. I should say that, as I indicated before that by reason of the peculiar nature of electrical energy, the court will say that the price fixing function in reference to electricity is within the constitutional power, of Congress. It has not done it so far in express terms.

Mr. HUDDLESTON. May I ask you for a reference to that case?

Mr. GATCHELL. East Ohio Gas case (283 U. S. p. 465).

Mr. HUDDLESTON. What is the title of the case?

Mr. GATCHELL. East Ohio Gas Co. *v.* Tax Commission of Ohio.

Mr. HUDDLESTON. Now, as I recall, in that case, the court undertook to pass upon what was interstate commerce and what was intrastate commerce, that is, to say where the dividing line was between the jurisdictions.

Mr. RYAN. I think that perhaps there was some confusion in that case. That was a tax case. It was a case where a tax had been imposed upon gas that had been imported into Ohio, and the State of Ohio then undertook to lay a tax upon its distribution. The court held that when the gas was reduced in pressure, it became intrastate commerce, and lost its interstate character. Upon this view the court sustained the tax.

I may add that that case has a special significance, so far as constitutional power of Congress is concerned, in connection with future legislation regulating electrical energy, because the case apparently reestablished the broken package doctrine. The Supreme Court in the Attleboro case said that Congress had the right to regulate interstate transmission of wholesale electrical contracts. The Supreme Court in the Pennsylvania Gas case said that the State had the right to regulate local gas rates, where the gas was imported by the company that distributed it, imported from another State; that such local regulation did not involve such a burden upon interstate commerce as would make the local exercise of power unconstitutional. They said that the business was interstate commerce, however, when the gas was distributed locally by the company that imported it from another state. The broken package doctrine was thus rejected. Now comes along the Supreme Court later, however, in the East Ohio Gas case, and abandons that doctrine of the Pennsylvania Gas case, and says that when gas is reduced in pressure, it loses its interstate character and becomes intrastate commerce.

Now, if the court should, in passing upon the questions of electrical energy, take the same view, the broken package view, and say that when the electricity is stepped down for local distribution it loses its interstate character, the power of Congress will then be curtailed. There will of course remain the doctrine of the Shreveport case to support Federal jurisdiction in a certain class of cases.

Mr. SHALLENBERGER. I would like to ask Mr. Ryan one question, before he goes. I was much impressed with what you said about the doctrine of empowering the Federal Commission to take action under such a bill as this, where there is already in existence a State commission, empowered to act. You do not think that that power should be granted and exercised by the Federal Commission where the State commission refuses to act?

Mr. RYAN. Well, I think that that would be a matter of legislative policy, as to whether the Congress would want to override the State.

Mr. SHALLENBERGER. You do not want to venture your judgment upon that, as to whether that is proper action for us to take. That is what I want to ask you, whether or not, in the opinion of the commission, or whether you should think something ought to be done there, or the power exercised, whether the State commission failed to act, in cases such as that. I think that that could very easily come up in connection with this bill.

Mr. RYAN. Well, the Federal Power Commission has expressed no opinion upon that, and the Congress did not place that power in the present Federal power act.

The CHAIRMAN. All right, we are very much obliged to you.

STATEMENT OF WILLARD GATCHELL, FEDERAL POWER COMMISSION

The CHAIRMAN. I want to say this to Mr. Gatchell, that we have a boy here that a number of the members of the committee have a lot of confidence in.

Do you have anything that you want to add this morning, to what has been said?

Mr. GATCHELL. Mr. Chairman, I think that Mr. Ryan has covered the ground. I do not think that there is anything more I can say at this time but, if the committee desires, there might be a few questions which I could answer.

The CHAIRMAN. Then, we will be glad to hear you in the morning. We will also have Mr. Benton here at that time.

(Thereupon, at 11.48 o'clock a. m., the committee adjourned to meet at 10 o'clock a. m., the following morning, Thursday, February 2, 1933.)

FEDERAL WATER POWER ACT

THURSDAY, FEBRUARY 2, 1933

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman), presiding.

The CHAIRMAN. The committee will come to order.

Mr. Gatchell, we will hear you this morning.

Mr. SHALLENBERGER. Mr. Chairman.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. Mr. Chairman, before you proceed, I would just like to make a short statement here.

Mr. Williams and I have gone over this bill, in connection with the questions which Mr. Huddleston and Mr. Nelson had injected, as to whether or not we were trying to give additional power to the commission that it had not had before; that is, the Federal Power Commission, or give it greater power over these various companies. We have had prepared, and I want to read into the record here, Mr. Chairman, some short amendments which I offer here on page 2, at the bottom of that page, in section 2, beginning with line 23, after the words "power to," strike out the rest of that line, all of line 24, and the first five words in line 25, and insert after the word "discrimination" in line 1, page 3, "resulting from such difference in rates to the extent not justified by a difference in cost," so that will read:

(2) Jurisdiction to enforce the above provision is hereby conferred upon the commission upon the complaint of any party aggrieved or upon its own initiative; and in any such case the commission shall have power to remove the unlawful element and such advantage, preference, prejudice, or discrimination resulting from such difference in rates to the extent not justified by a difference in costs.

In other words, we are seeking there to limit the power of the commission to interfere in the rates, to the extent required to adjust rates, so far as affected by the difference in costs.

And then, on page 9, Mr. Chairman, at the bottom of that page, after the section 8, we would add an additional section, section 9, reading:

Nothing in this act shall be construed to enlarge the power of or to grant additional power to the Federal Power Commission with respect to the establishment of reasonable rates per se, or to establish the value of the property of any "Person" as defined in (7), (E) or the reasonableness of the return thereon; nor to abridge the jurisdiction of any State to fix reasonable rates per se on intrastate business.

In other words, we do not seek to enlarge the powers of the commission, to interfere with any State commissions, or in any case to go any further than to require that the rates shall be fair as between the two communities.

The CHAIRMAN. Very well; we will hear Mr. Gatchell.

How much time do you thing that you will take, Mr. Benton?

Mr. BENTON. I think that I can conclude what I have to say in 40 minutes.

The CHAIRMAN. We want to close this hearing to-day. Suppose that you have an hour, then.

Mr. BENTON. I can say what I have to say in less than an hour. Of course, that does not include time taken up in reply to interrogatories.

The CHAIRMAN. Mr. Gatchell, we will give you 45 minutes. We want to get through, as I say, to-day.

STATEMENT OF WILLARD W. GATCHELL, ATTORNEY, FEDERAL POWER COMMISSION

Mr. GATCHELL. Mr. Chairman and gentlemen of the committee, in the first place, I want to express my appreciation to the chairman of the committee for your gracious remarks yesterday and simply to say by way of interpolation that the commission felt that as I had given considerable study to some phases of interstate transmission of electricity, particularly under the guidance of former Commissioner Ralph B. Williamson, who was assigned the task of studying the legislative dispositions necessary in the consideration of that question, they felt that there might be some things that I might be able to explain to the committee that might be of some help, either in connection with this specific bill, or with the general purposes of the bill.

It might be helpful first to start with an analysis of the problem with which you are faced. Of course, that would have to begin with an analysis of the physical characteristics of electricity.

There has been a good deal of confusion among some writers in legal periodicals as to the basis of jurisdiction between State and Federal Governments over the general question of electrical transmission.

Electricity differs from every other product with which this committee will deal, and by reason of this physical difference an economic condition has been created which likewise differs from other situations. When you turn on an electric switch you get only one thing—service. You do not get a commodity; you get a service. That is, you have energy or a force at one end of the wire in the generator transmitted to the other end of the wire in your light bulb and the service consists of transferring that energy from the generator where it is created to the light bulb where it is consumed.

Electricity differs from natural gas in this particular. Natural gas can be compressed or expanded, resulting in a greater or less quantity of gas within the same cubic content, depending on the pressure. Electricity can not be compressed in this manner nor its cubic contents measured. It can be stepped up to a high voltage, giving a greater amount of energy, or reduced in voltage for consumption. The voltage is limited by the size, strength, and composition of the wire over which it is transmitted, but within these physical limits of a transmission line itself the voltage can vary between rather wide margins. One fundamental difference between the problem of dealing with the transmission of electricity and the transportation of gas is that your electric current exists only when connected with a generator, whereas, your gas-pipe line may be disconnected from the source of supply without losing the commodity itself.

The problem with which engineers are faced in the transmission of electricity over long distances is how to eliminate transmission-line losses. When these losses can be overcome the chief difficulty in the way of long-distance transmission will disappear and the problems of State and Federal regulation will become more acute. In the present interstate transmission of electricity regional systems have been created which cover in general only 1, 2, or at most 3 States. Should it ever be possible to transmit electricity long distances without losing the energy the generating plants can be located close to the source of supply and serve distant communities through huge networks of transmission and distribution lines. When we are dealing with the problem of Federal control to-day we are dealing with a problem that has not as yet been fully considered by the Supreme Court from the question of national control. The systems in the past have been rather small, isolated systems, at most comprehended within the boundary of a single State.

With this preliminary statement we come to an analysis of the cases which have been before the Supreme Court, to show, first, the dilemma in which the Supreme Court is placed and, secondly, one solution which has been suggested for the dilemma.

The first case which sems to furnish a guide arose in Kansas, Public Utilities Commission *v.* Landon (249 U. S. 236), decided in 1919, a case which might well illustrate a change which has come over the electric industry, although the subject there considered was natural gas.

In 1919 the court could have made similar deductions to those reached in the Landon case and applied the principle to the electric industry had it been necessary to do so, but since that time the electrical systems have been enlarged by holding companies and local plants coordinated with large regional systems.

The Supreme Court in the Landon case said that when the natural gas was transported across a State boundary by a wholesale company and there sold to local distributing companies, when that sale took place interstate transmission ended and local regulation was possible. While that decision is rather ambiguous in some particulars, it is not believed necessary to analyze it more in detail, as it is clarified by later decisions.

The next case bearing on this matter was where natural gas was transported across Pennsylvania into New York and the latter State wanted to regulate the rates at which the gas was sold in Jamestown, N. Y. The Supreme Court, having fixed a rule in the Landon case that a State could regulate the sale of natural gas to consumers where there was a sale from wholesalers to distributors within the State, in the New York case, Pennsylvania Gas. Co. *v.* Public Service Commission (252 U. S. 23), was faced with a different problem. Here

the wholesaler and the distributor were the same company and the entire transaction was recognized as continuous and single and, therefore, a transmission in interstate commerce. The Supreme Court upheld the local regulation because the service rendered was essentially local, requiring the use of city streets, a franchise from the city, and was not of that character requiring general and uniform regulation by Congress. Furthermore, that in the absence of superior authority of the Federal Government local regulations of reasonable character were necessary in the interest of consumers (p. 30). The court definitely rejected the broken-package doctrine in this case, but restored it, as we shall see, in the East Ohio Gas tax case in 1931.

There is another case to which I probably will make reference again, and that is——

Mr. NELSON. Let me ask you there. Was there any doubt in either of those cases, touched on, as to the question, as to whether the Federal Government can fix prices at which to sell?

Mr. GATCHELL. I am afraid that selling price has bothered you, Mr. Nelson.

Mr. NELSON. It is bothering me now.

Mr. GATCHELL. And I think there are two answers to it. The first is as to the essential character of electricity. When you pick up a telephone and telephone to New York, it is clear that the Federal Government can regulate the price which the American Telephone & Telegraph Co. or a subsidiary charges you for that interstate conversation. All that you do is to project your voice into the transmitter at this end, and at the other end they receive your voice over the wire. There is nothing even closely resembling a commodity that passes. It is simply a service.

When you turn on your electric switch, unless the line is connected directly with the generator, you can receive no electric light in your house. The transmission of the energy from the generator to your home is the service which you receive.

That service is the same, whether it is electricity that lights your house, or whether it is electricity that transmits the telegraph or telephone message.

Furthermore, when you get on a train, say at Washington, and go to Chicago. Clearly, the Federal Government has a right to say how much the railroads shall charge you. Although you might go over any number of lines, over a number of different railroads, and from one car to another, the Federal Government can say how much the railroads shall charge you for your trip. For what? For simply the service you receive.

Mr. NELSON. You say that electricity is not a commodity; it is a service?

Mr. GATCHELL. Yes, sir.

Mr. NELSON. How do you know what electricity is?

Mr. GATCHELL. Well, I am using only an analogy which answers the problem that faces the Supreme Court in dealing with the matter. No one knows what electricity is.

Mr. NELSON. Did they say that it was a service and not a commodity?

Mr. GATCHELL. The Supreme Court has dealt with electricity in a rather peculiar way. They have not yet considered the nature of electricity.

Mr. NELSON. Yes.

Mr. GATCHELL. I have been discussing gas cases, and I have one or two more.

The CHAIRMAN. Go ahead.

Mr. GATCHELL. I want to answer the inquiry as to the fixing of a selling price, because I think the first answer to consider in the regulation of selling price is the nature of the service in transmitting electricity, and the second answer is the Supreme Court does not shy away from the fixing of a selling price.

Here is what the Supreme Court has to say in the case of Missouri *v.* Kansas Natural Gas Co. (265 U. S. 298). This is a case in which the wholesaler wanted to raise the price of gas to the distributors, located in Kansas and Missouri. Naturally the Missouri and Kansas commissions interfered. They wanted to regulate the price at which the gas was sold by the wholesaler to the distributors, and the Supreme Court said they could not do so. Here is what it says on page 308, found in volume 265 of the United States Reports:

> The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. (See Robbins *v.* Shelby County Taxing District (120 U. S. 489, 493).) With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to State regulation. Public Utilities Comm. *v.* Landon, supra, p. 245. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve.

The court does not worry about the selling price. The selling price here is the price at which you sell your services. A railroad has the right to sell its services, but the selling price is fixed by the Federal Government.

As long as you have the analogy in your mind between commodities and electricity, you are going to be troubled with this question of just how you can get around that phase.

With natural gas, when it gets into the high pressure pipe lines, passing from one State to another, you can cut off a segment of the line and you will have the gas in that line. But you can not cut off a segment of an electrical transmission line. If you do, what do you have? Nothing but wire. You do not have any electricity.

If your electric light, your electric motor, or any electrical apparatus, your electric heater, is not connected from the socket right back to the generator, you get no electricity. True, you can put in storage batteries, but storage batteries do not enter into the picture, because they are used in such a small way in the interstate transmission of electricity.

There is another case dealing with natural gas, Western Distributing Co. *vs.* The Public Service Commission of Kansas. That case was decided in February of last year, and it is found in 285 U. S. at page 119.

There the State of Kansas attempted to fix the rates charged for gas at the city line in El Dorado, Kans. The gas was transported from the gas fields of a subsidiary of the Cities Service Co. up to the city gate of El Dorado, and there they wanted to charge 40 cents a thousand cubic feet. In other cities throughout the State of Kansas in which this gas was distributed the rates had been fixed by the States as reasonable. But the company attempted to keep this rate at the city gate, and the public-utilities commission wanted to inquire into the cost of that gas to the wholesale company, although both the wholesaler and the distributing company were owned by the same parent corporation, the Cities Service Co. They attempted to inquire into the cost to the wholesaler and they found themselves blocked.

The Supreme Court failed to pass directly upon whether or not this was another Pennsylvania Gas Co. case, in which the wholesaler and distributer were the same, but the effect on interstate commerce was negligible and considered the holding company. Because of the identity of interest between the wholesaler and the distributor, the court said the State should have a right to examine into the costs to the wholesaler to determine the reasonableness of the local rates.

Next, we come to the case of the East Ohio Gas Co.

Mr. NELSON. They confirmed the other decisions that when it had been delivered to the distributor its interstate character ceased?

Mr. GATCHELL. Yes; but they were attempting to inquire into the wholesale cost.

Mr. NELSON. Yes; but there they said that it had ceased to be interstate commerce.

Mr. GATCHELL. Yes; but if they fixed the wholesale price, the price charged by the company transmitting it across State lines; if they fixed that price when it was sold to the distributor, it was still in interstate commerce, which did not end until it lost its identity and had been mixed with the general property of the State. Therefore, after interstate commerce ceased, the Supreme Court seems to indicate, the State might have the right to fix the price at the city gate. They go further than in the Pennsylvania Gas Co. case and further than in any other case.

Mr NELSON. Well, is there any intimation that they could fix the price at which that gas would be delivered to the distributor by the transmission company?

Mr. GATCHELL. That is just where the Supreme Court——

Mr. NELSON. Well, I did not think that they did that. They could fix the local price and limit their charges to the consumers—consumers' prices—but they can not say to transmission companies that they must sell at a certain price.

Mr. GATCHELL. That is just where the Western Distributing Co. case shies away from the problem with which the court was faced and goes off on the holding-company problem. As I say, this case is not as good a case or as strong a case as the Supreme Court might have made had they considered the issues which could have been considered in that case.

Mr. MAPES. As I understand it, you conclude that their intimation is that they have the right to inquire into the wholesale price because of the close connection between the holding company, or the distributing company and the selling company?

Mr. GATCHELL. That is the only conclusion that you can reach from the opinion. It is solely a question of intercorporate connection.

Mr. HUDDLESTON. May I ask you a question there?

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. Reference has been made to the fact that these concerns, some of them, operate public utilities.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. What figure does that cut in connection with this problem; what has it got to do with it?

Mr. GATCHELL. It has a great deal to do with it.

While the power of the Federal Government must, of course, be based on the commerce clause, not all things transported in interstate commerce are subject to Federal regulation. The products of child labor offer the most striking example in that connection, and in Hammer *v.* Dagenhart (247 U. S. 251), we find that the Federal Government could not regulate all the products, when it went back and tried to regulate the processes of manufacture.

Mr. HUDDLESTON. It is said that the purpose of the child-labor law was a "social" purpose and not the regulation of commerce. On that ground it was declared unconstitutional.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. And that it was not properly a regulation of interstate commerce.

Mr. GATCHELL. Yes, sir.

Mr. HUDDLESTON. That is what the court said in that case?

Mr. GATCHELL. That is what they said.

Mr. HHDDLESTON. Now then, in the regulation of interstate commerce, is not the power of Congress over commerce the same, whether carried on by a private individual, as by a corporation operating a public utility? How do you differentiate them?

Mr. GATCHELL. No. I do not think that the court would follow that far. There is no clear case that I have been able to put my hands on, between yesterday and to-day, that I could bring up here and have reference to this morning. I think that there is a difference which has grown up, as illustrated by the ice case in Oklahoma, a difference as to the general power. Of course, the Federal Government has no police powers.

Mr. HUDDLESTON. That was not a case of interstate commerce.

Mr. GATCHELL. I beg your pardon; I did not catch that.

Mr. HUDDLESTON. That Oklahoma case was not an interstate commerce case.

Mr. GATCHELL. No, it was not, but that was an attempt by the State to regulate a private company, or a manufacturing company.

Mr. HUDDLESTON. So that the "commerce clause" was not under consideration.

Mr. GATCHELL. No, it is not an interstate commerce case, but a case in which they attempted to declare ice making a public utility. No, that question was no covered.

Mr. HUDDLESTON. Congress has power, under the Constitution, to regulate interstate commerce.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. And commerce may be carried on as well in the sale of commodities, as in the sale of service.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. Commerce may be carried on as well by private individuals as by a utilities company.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. How are you able to say that the power of Congerss is not just as great in one case as in the other?

Mr. GATCHELL. As to just how far the Supreme Court is going to go in upholding the power of Congress, because it is a public utility, I should say that has not yet been decided. The court might have approached the matter in the case of Paul *v.* Virginia (8 Wall. 168 (1869)), where they said that an insurance contract is not interstate commerce, although the contract was made by a New York company and transmitted back to Virginia.

Mr. HUDDLESTON. Of course, what "commerce" is, is quite another question.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. Where it is "commerce," and assuming that it is "commerce," whether it be in the sale of service or commodity, it is commerce.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. And it is interstate commerce.

Mr. GATCHELL. Yes.

Mr. HUDDLESTON. How can you say that the Congress has less power over one form than another?

Mr. GATCHELL. As I say, I have not been able to find any authority for that proposition.

Mr. HUDDLESTON. You found nothing against it?

Mr. GATCHELL. I have not found anything on it, either way.

In the East Ohio Gas Company case (283 U. S. 465), 72 per cent of the supply came from West Virginia, 3 per cent from Pennsylvania, and 25 per cent from its own wells in Ohio. The supplies were mingled and distributed in Ohio, which State sought to tax all receipts from the sale of gas without regard to the source of the gas furnished and applied the prescribed rate to amounts theretofore treated as receipts from interstate business. The question decided by the court was whether the State statute, construed to include the amounts received from interstate business, operated directly to regulate or burden interstate commerce. The producer sold direct to the consumers, but in the process the pressure of gas was first raised to between two and three hundred pounds per square inch and taken to distribution points where it was reduced to a pressure from 30 to 50 pounds per square inch for distribution by the municipality, and then eventually in the local supply mains reduced to a pressure of a few ounces per square inch. The court held that the reduction in pressure constituted a breaking of the original package and that at this point interstate commerce ended.

The court has the following to say about the Pennsylvania Gas Company case:

Appellant relies on Pennsylvania Gas Co. *v.* Public Service Comm. (252 U. S. 23). There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that State from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403–404), held that the entire movement of the gas was interstate commerce and that, in the absence of contrary regulation by the Congress, the State commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in Public Utilities Comm. *v.* Landon, supra, and in Missouri *v.* Kansas Gas Co., supra. In the former the court said (p. 245): "Interstate movement (of natural gas being transported from State to State) ended when the gas passed into local mains." In the latter it was said (p. 308): "With the delivery of the gas (transported from one State to another) to the distributing companies * * * the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to State regulation. * * * In such case the effect on interstate commerce, if there be any, is indirect and incidental * * * (p. 309). The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." It does not appear that there were presented, in Pennsylvania Gas Co. *v.* Public Service Comm., to the State court, or here the considerations on which it is held that interstate commerce ends and intrastate business begins when gas flowing through pipe lines from outside the State passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here.

It will be noted that in the East Ohio Gas Company case the Supreme Court was attempting to uphold a State tax, whereas in the Pennsylvania Gas Company case the power sought to be exercised was one of regulation alone.

There is another phase of the problem which we have not yet considered, namely, the generation of electricity. The Utah Power & Light Co. was engaged as a public utility in generating, transmitting, and distributing electricity, power, and energy in Idaho, Utah, and Wyoming. The State of Idaho sought to enforce an act levying a license tax on the manufacture, generation, or production under their laws of 1931. In May, 1932, the Supreme Court rendered an opinion involving the validity of this tax (Utah Power & Light Company *v.* Emmitt Pfost, 52 Sup. Ct. 48). The court discusses the process of generation in the following language:

The point is stressed that in appellant's system electricity is not stored in advance but produced as called for. The consumer in Utah, it is said, by merely turning a switch draws directly from the waterfall in Idaho, through the generating devices, electrical energy which appears instantaneously at the place of consumption. But this is not precisely what happens. The effect of turning the switch in Utah is not to draw electrical energy directly from the waterfall, where it does not exist except as a potentiality, but to set in operation the generating appliances in Idaho, which thereupon receive power from the falling water and transform it into electrical energy. In response to what in effect is an order, there is production as well as transmission of a definite supply of an article of trade. The manufacture to order of goods and their immediate shipment to the purchaser furnishes a helpful analogy, notwithstanding the fact that there the successive steps from order to delivery are open to physical observation, while here the succession of events is chiefly a matter of inference—although inference which seems unavoidable. The process by which the mechanical energy of falling water is converted into elec-

trical energy, despite its hidden character, is no less than the conversion of wheat into flour at the mill.

The apparent difficulty in perceiving the analogy arises principally from the fact that electrical energy is not a substance—at least in common meaning. It can not be bought and sold as so many ounces or pounds, or so many quarts or gallons. It has neither length, breadth, nor thickness. But that it has actual content of some kind is clear, since it is susceptible of mechanical measurement with the necessary certainty to permit quantitative units to be fixed for purposes of barter, sale, and exchange. However lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary tokens of materiality. It is subject to known laws; manifests definite and predictable characteristics; may be transmitted from the place of production to the point of use and there made to serve many of the practical needs of life.

Following this reasoning the court held that the generation occurred as a process of manufacture some place in the generator, at which point measuring appliances can be placed and the amount of electrical energy ascertained with practical accuracy. Therefore, the court held the process of generation to be essentially local as though electrical energy were a physical thing and applied the general rule that commerce does not begin until manufacture is finished; and hence the State was not prevented by the commerce clause of the Constitution from exercising exclusive control over the manufacture.

Mr. NELSON. May I ask you a question?

Mr. GATCHELL. Yes; certainly.

Mr. NELSON. Does any State put any excise tax on the exporting of electrical power?

Mr. GATCHELL. Not that I recall. Of course, Maine tries to keep all of the electrical energy from water power within the State boundaries.

Mr. NELSON. Are there not any States which export power, which put an excise tax on its exports?

Mr. GATCHELL. Not that I recall.

Mr. NELSON. This State which you mention attempted to?

Mr. GATCHELL. No. This State levied a generation tax.

Mr. NELSON. What?

Mr. GATCHELL. It was a tax on the generation of electricity.

South Carolina has another case which was recently argued in the Supreme Court, and I presume that we will soon have a statement from the Supreme Court dealing with another generation tax.

The tax in the Idaho case was a tax on the generation and the Supreme Court upheld it by limiting the manufacturing process to the generator.

When the Supreme Court eventually comes to consider the subject of interstate transmission of electricity, it will be faced with the Idaho case and the East Ohio Gas Tax case, and should it consider electricity as a commodity, as it may, but if it considers electricity as a commodity, it will have to take one horn of the dilemma, or another. It will say that the Federal Government has nothing to do with the generation, it has nothing to do with the distribution; all the Federal Government can regulate is transmission. The question then will be whether it is in transmission from the time it leaves the generator, or the bus bar of the generating station until delivered or sold to the distributing company in another State.

The cost of generating the electricity will not enter into the picture, because that is purely a State matter. The cost of selling the electricity will not enter into the picture, because that is purely a State matter. So that all that the Federal Government can regulate, if the Supreme Court takes that view, will be simply the cost of sending it over the wires which will be practically only the return on the cost of the wires themselves, plus a reasonable charge for maintenance and so on.

There seems to be some doubt in the Supreme Court whether they have been dealing with this in the proper way, because there was a case which recently arose out in Indiana—Mr. Drayton started to refer to it yesterday, but did not have an opportunity to do so. That case was where wholly intrastate commerce was involved. The question of interstate commerce did not enter into it at all.

Mr. MAPES. I did not get that last sentence.

Mr. GATCHELL. That was a case where wholly intrastate commerce was involved. The question of interstate commerce did not enter into that case at all. The transmission was wholly within the State of Indiana. A plant at Martinsville, Ind., a town of some 5,000 population, was bought by the Wabash Valley Electric Co., and by reason of the enlarged resources of the parent company, the Central Indiana Power Co., they were able to put it on a more sound financial basis. The company connected up high-power transmission lines and bought other plants, until they covered 13 counties in Indiana.

The State public service commission wanted to fix the value of the property at Martinsville, in order to determine what rates in Martinsville would be reasonable. Most of the power used in Martinsville came from the interconnected system, and not from the local plant, which was still in use.

The district court, in an extended opinion, went over the operations of the company very thoroughly to consider just how to apportion the value of the property used in the local distribution of electricity in order to give the company a fair return in fixing the rates and at the same time to insure that the consumers would not pay exorbitant rates for electrical service.

The State commission, a special master, and the district court apportioned the property, and the Supreme Court considered whether or not a fair method of apportionment has been used. The decision was handed down in the Wabash Valley Electric Co. *v.* Ralph M. Young, on January 9, 1933.

Railroad valuations had, of course, been before the court in a number of instances, but this was an electrical service, and here is what Mr. Justice Sutherland, speaking for the court, says:

Normally, the unit for rate-making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit. Compare United Gas Co. *v.* R. R. Comm'n (278 U. S. 300); United Gas Co. *v.* Public Serv. Comm'n (id., 322); the Minnesota Rate Cases, supra (at pp. 434–436); Smith *v.* Illinois Bell Tel. Co. (282 U. S. 133, 148, et seq.); Houston *v.* Southwestern Tel. Co. (259 U. S. 318, 322).

The three cases last cited recognize that where the business of a carrier or utility is both interstate intrastate, the State rates for intrastate transportation or business must be determined by a separate consideration of the value of the property employed in the intrastate business. It is true that where

such a separation is made necessary because a different Government exercises the rate-making power in each of the two fields of regulation; and that situation is wanting here. Nevertheless, the cases furnish a helpful illustration in support of the application of a similar rule in the case now under review. Compare United Fuel Gas Co. *v.* Railroad Commission (13 F. (2d) 510, 522); United Fuel Gas Co. *v.* Public Service Commission (14 F. (2d) 209, 223): Idaho Power Co. *v.* Thompson (19 F. (2d) 547, 571); and see International Ry. Co. *v.* Prendergest (1 F. Supp. 623, 626).

I make a reference to that here, not because it is controlling in connection with the Federal jurisdiction of interstate transmission as such, but it is indicative of the attitude of the Supreme Court last month.

If the court adopts the theory that prevailed in the Shreveport case—and this opinion cites the Shreveport case—then the Federal power will be very extensive. If it adopts the doctrine laid down in some of these gas cases, it will be a limited jurisdiction.

Mr. SHALLENBERGER. This is the Supreme Court of the United States that you are referring to?

Mr. GATCHELL. This last case I cited is a case decided by the Supreme Court of the United States on January 9, 1933.

Mr. Ryan calls attention to a fact which I had overlooked, and that is that this opinion also answers very definitely and specifically the question as to whether we should have to value the whole interconnected system in order to make rates in one community. Of course, such is not necessary. It is not necessary in the railway field and this is the first case the Supreme Court has passed on dealing with the problem in the electrical field.

Mr. NELSON. Let me ask you one question.

Mr. GATCHELL. Yes, indeed.

Mr. NELSON. Is it your determination that the future attitude of the Supreme Court will be influenced by whether or not it decides that electricity is a commodity or a service?

Mr. GATCHELL. I think that will have a great deal of weight in consideration of the question; yes, sir.

Mr. NELSON. Well, if it is a commodity, how are they going to regulate its price?

Mr. GATCHELL. Well, they certainly deal with the selling price in this Missouri *v.* Kansas Gas Co. case. They say the State could not regulate the wholesale selling price.

Mr. NELSON. That is where the State undertook to handle it?

Mr. GATCHELL. Yes. That was a case where the wholesaler attempted to raise the rates of the distributor, and the State commission attempted to fix the rate of the distributor. The Supreme Court said that the State could not do that. They could not fix the selling price.

Mr. NELSON. That is what I claim.

Mr. GATCHELL. Sir?

Mr. NELSON. That is what I claim; that this is a commodity. The Federal Government can regulate its transmission. They can regulate its rates of transmission, and the safety devices needed, and so on, but they can not determine the price at which it is to be sold.

The CHAIRMAN. They can determine there that Congress can fix the price there, and they can determine the question of what, under all of the circumstances, as to that gas in that case that the State could not do it.

Mr. GATCHELL. They said that the State could not do that. They did not pass on the feature with regard to fixing prices, but the lines which I read clearly import that Congress has sole power in that case.

The CHAIRMAN. But do you think, Mr. Gatchell, under the white-slave cases—in the white-slave cases the principle has been carried by the court much further, I think, than Congress ever thought about when it passed the Mann Act, which was to stop the traffic. That the act of sexual intercourse was commerce, Congress, I do not think, ever contemplated, but the decisions of the court have made it such.

Mr. GATCHELL. Absolutely.

The CHAIRMAN. And if Congress has the power to do that, do you not think that it has the right, or that the Supreme Court in all probability would hold, or within a few years at least, will uphold the doctrine that Congress has the right?

Mr. NELSON. I can not understand what you say.

The CHAIRMAN (continuing). Under like decisions of that court.

Mr. NELSON. What is that; white-slave cases?

The CHAIRMAN. Yes.

Mr. NELSON. What has that got to do with fixing prices?

The CHAIRMAN. Well, I think that that is even going further than fixing prices.

Is it your opinion that the Supreme Court of the United States, in all probability, would uphold a law fixing the price on electricity moving in interstate commerce?

Mr. GATCHELL. I believe the Supreme Court will eventually uphold the Federal power to fix the price on electricity moving in interstate commerce, and it will not be bothered as to whether electricity itself is a commodity or a service. But it will uphold the Federal right to fix the selling price of the service of transmitting electricity.

Mr. MAPES. Mr. Gatchell, do you think that that is a logical conclusion? A logical conclusion from that Utah Power case or from the Ohio case?

Mr. GATCHELL. The Utah Power Co. case deals solely with its generation. It was an attempt to uphold the rights of the State to tax. The court could have upheld that right on another ground, which it did not.

Mr. MAPES. If the Supreme Court has held that the State can regulate the cost of generation, and also regulate the cost of distribution, there is not much left for the Federal Government to take jurisdiction over, is there?

Mr. GATCHELL. That is exactly the conclusion, if the Supreme Court had held that, but the Supreme Court has not yet held that.

Mr. MAPES. Well, I understood from you it had.

Mr. GATCHELL. No; I say that it has held that in connection with gas, but it has not held that in connection with electricity.

Mr. MAPES. I understand.

Mr. GATCHELL. And furthermore, this Idaho case, in which they had a generation tax, did not say definitely that the State can prohibit the generation of electricity or that the State, by taxing the generation of electricity, could prevent interstate commerce, but simply that the State could tax the manufacturing process of gen-

erating electricity, a process which was local and preceded interstate commerce.

Mr. MAPES. Well, if that is a State function, it would take away a good deal of the power of the Congress to control the price of it.

Mr. GATCHELL. Yes. Mr. Justice Sutherland, in delivering the opinion for the Supreme Court, fails to go as fully as he might into a discussion of the physical characteristics of the problem. Probably he should have ended the process of generation at the bus bar of the generating plant. He does uphold the State tax, however, on the ground that generation was a manufacturing process apart from transmission.

Mr. HUDDLESTON. May I call your attention to the antitrust laws? Under the commerce clause, Congress has passed those laws and assumed to regulate prices, not to fix prices, but to deal directly with prices in that they forbid individuals agreeing together with relation to resale prices. Now, is it possible to differentiate that from a case of fixing prices, assuming always that it is a proper "regulation" of commerce?

Mr. GATCHELL. Of course, if it is not a proper regulation of commerce to prohibit unjust discrimination in the antitrust laws, if that is not a regulation of commerce, then it is not constitutional, and the antitrust laws have been upheld so many times that their constitutionality is no longer questioned.

Mr. HUDDLESTON. I am assuming the legality of the antitrust laws, and the legality of the interpretation which prohibits agreements on price fixing.

Mr. GATCHELL. Exactly.

Mr. HUDDLESTON. Now, if that is legal, how can it be said that a provision of law fixing a price would not be legal?

Mr. GATCHELL. Well, I have not——

Mr. HUDDLESTON (continuing). Of course, it is always to be understood that my question implies——

Mr. GATCHELL. Interstate commerce?

Mr. HUDDLESTON. That it is "regulation" in a proper sense. If it is not "regulation," then, of course, Congress has no power, but if it be "regulation," the fact that you are dealing with a commodity price instead of a service charge is, as I see it, unimportant, and whether you are dealing with a public-utility company or an individual is unimportant; and whether you have one transaction instead of a multitude of transactions is unimportant. The whole issue is, in the first place, is it "regulation"? In the next place, is it "commerce"? Now, given an affirmative on both those, how could there be any doubt of the power of Congress?

Mr. NELSON. Then, carrying your argument to its supreme conclusion, Congress could fix the prices at which anything may be transmitted in interstate commerce.

Mr. HUDDLESTON. If it be "regulation."

Mr. NELSON. I say, if it is "regulation."

Mr. HUDDLESTON. Yes.

Mr. NELSON. Then, you can fix the price of everything?

Mr. HUDDLESTON. Absolutely, if it is in the proper sense "regulation." Of course, the commerce clause has a purpose. It is intended to permit free intercourse and the free flow of trade between the

people of the various States; that is the fundamental purpose of the commerce clause.

Now, then, if the free flow of trade, the free operation of the laws of competition and of free intercourse, are furthered and facilitated by the fixing of prices, I do not see how the power of Congress, under the commerce clause, can be questioned.

Mr. SHALLENBERGER. I would like to ask the gentleman one question. What is the distinction here—I would like to ask the witness——

Mr. NELSON (interposing). But, does that imply the power to fix prices, Mr. Huddleston.

Mr. HUDDLESTON. If it is regulation.

Mr. SHALLENBERGER. Is it not the purpose of this bill to regulate the prices, so far as to prevent a corporation from destroying a competitor by unfair competition.

Mr. GATCHELL. Yes. I had not reached an analysis of this bill as applied to the general problem which I have been outlining.

Mr. SHALLENBERGER. That is the purpose of this bill.

Mr. GATCHELL. Yes. This bill has two purposes. First, it would seek to prevent unjust discrimination between municipal plants, and second, extend the jurisdiction of the commission beyond its licensees, and their subsidiaries, and customers, as provided in section 20, to any interstate transmission of electrical energy.

Mr. SHALLENBERGER. I think that is a correct statement.

Mr. GATCHELL. That is right in line with this matter.

The CHAIRMAN. Mr. Gatchell, we are going to have to let Mr. Benton go on pretty soon.

Mr. GATCHELL. All right.

The CHAIRMAN. I would appreciate it very much, and I know that the committee would, if you would expand your statement and include the law as applied to this special bill, this specific bill.

Mr. GATCHELL. All right.

The CHAIRMAN. And give, if you will, the history of this development and I will say that we are very glad to see you back up here, and very proud of you.

Mr. MAPES. Could we not give him a few minutes more, to continue his statement?

The CHAIRMAN. If it is the desire of the committee.

Mr. BENTON. I would be glad to surrender some of my time to him.

Mr. MAPES. I think that we would like to hear him further.

The CHAIRMAN. I am trying to close the hearings to-day.

Mr. NELSON. I would like to hear him discuss it further.

The CHAIRMAN. I am trying to close the hearings to-day, Mr. Nelson.

Mr. NELSON. Well, I think that this is interesting. We have got time enough. I do not see why we can not give this young man a chance. He has evidently done a lot of work on this subject, and is making a very interesting statement.

The CHAIRMAN. I would be glad to hear him further, if it is the desire of the committee, but we want to close these hearings to-day.

Then you may proceed further, Mr. Gatchell.

Mr. GATCHELL. I did not prepare a regular statement. I am simply here at the invitation of the committee.

However, I want to point out, and I will be very, very brief, I want to point out the jurisdiction which is conferred by section 20. You will find in section 20, this phrase, in connection with Federal regulation of power from licensed plants:

So much of the service rendered and of the rates charged in payment therefor as constitute interstate or foreign commerce.

That is very clearly a limitation in section 20 of the jurisdiction of the commission over licensees, to only those engaged in interstate transactions. That is, the transmission must be logically and clearly called interstate commerce.

This bill would extend the jurisdiction of the commission over power from licensees to those cases that would arise under what we call the Shreveport doctrine.

There are two other matters which should be considered by the committee in connection with this bill: First, that this bill is not an attempt—although it is rather poorly phrased, without criticizing at all, it is rather poorly phrased in its provisions—to provide for the valuation of this property. The intent was not to give the commission authority to value the property of any and all electric companies.

Mr. SHALLENBERGER. Excuse me, but do you know about the amendments?

Mr. GATCHELL. Yes. Mr. Drayton called me up last night about them.

Mr. SHALLENBERGER. Does that clarify that?

Mr. GATCHELL. I have not studied the amendments which were submitted by Mr. Shallenberger this morning further than a statement which was made by Mr. Drayton to me last night over the telephone. The purpose which the proponents of this bill had in mind, and which they explained in submitting it to the Federal Power Commission, was, in the first place, that valuations would be by the State utility commissions.

If this commission were to have power to value the properties, such a rate base would be constantly open to attack, and would be attacked, most assuredly, by the companies involved when the Federal Power Commission attempted to fix rates.

Where a company not a licensee operates in interstate commerce serving communities in different States this bill seeks to prevent rates being charged in one State which are higher or lower than rates charged in another State when such difference in the rates constitutes unjust discrimination between the communities. This is the clearest case which could be considered in connection with this bill, but the difficulties which arise are more manifest where the communities in State A are so small and the amount of electricity sold in State A is so low that it could not logically be considered as affecting sales in State B, if in State B a great many more communities were served with a much larger demand for power. That is to say, if in Georgia there are 100 communities being served consuming 100,000,000 kilowatt-hours of electricity per year, and in Alabama only two or three communities are served consuming fifty or one hundred thousand kilowatt-hours per year, the difficulty of regulating rates in Georgia, because of a low or high rate in Alabama, would at once be apparent.

Furthermore, the question would arise as to whether a variation of the rates in the State of Georgia alone could be regulated solely

because of the burden of interstate commerce where the average Georgia rate was charged likewise in the State of Alabama. That is, in attempting to protect the interests of interstate commerce, how far can the Federal Government regulate within a State discriminations between communities where there is no effect demonstrable on interstate transmission? This leaves us clearly with the antitrust cases bearing the brunt of supporting the constitutionality of this proposed legislation.

While the language appearing on page 2, beginning with line 20 to the bottom of the page, would clearly give the commission the right to prescribe rates—and I called the attention of the gentlemen to that when they were before the Federal Power Commission—it would give them the authority to prescribe not only maximum rates, but minimum rates, as well, which is a larger power than simply prescribing the maximum rates. That was not the intention of the proponents of this bill. What they have in mind probably might be accomplished effectively by saying that if your rates are discriminatory, they are unlawful. The companies can remove the discrimination themselves, and the Federal Power Commission would not fix a single rate. It would not mean that we would have valuations by a vast corps of engineers, going all over our country. It would not mean that the companies would be constantly assuming an antagonistic attitude to the valuations placed by the commission on their properties. But it would mean that we would have, by this means, an example of Federal regulation in which the States could and should have the first say. If the States are able to remedy the situation,—although this bill does not provide specifically for it, and can be amended so as to do so—but if the States provide specifically for this regulation, then this Federal power was not intended to be exercised.

If there are any questions——

Mr. NELSON. You mean that the power could not be exercised if the State authorities exercised that power?

Mr. GATCHELL. Yes.

There is one defect in the Federal water power act (in addition to a good many others) to which I might call attention in this regard, and that is that this act does not contain a declaration of the policy of the Congress. It would have been very easy for them to have put it in section 20, or section 19, or both, and it would have clarified the two sections to have a declaration of policy by Congress, that the Federal jurisdiction shall not be exercised where there is proper State regulation.

These sections attempt to do that. The language is so indefinite, however, the commission has had difficulty in interpreting just what Congress meant by the provisions of sections 19 and 20, which has caused confusion, extending through the years, when three Cabinet officers formed the commission down to the time when a permanent commission was organized two years ago. Whether this difficulty will be clarified by administrative interpretation, I do not know, but the difficulty is there, and if this amendment is passed, a declaration by Congress of its policy could easily be incorporated into this bill.

Mr. NELSON. Well, if we pass this bill, do we, or do we not anticipate the action that the Supreme Court may take; that is, whether

they will determine that electricity is a commodity, and we can not fix the price, or whether it is a service and we can assume some power over it?

Mr. GATCHELL. I think the main purpose of this bill could be enacted without anticipating the action of the Supreme Court at all.

Mr. NELSON. Well, might it not be possible that the Supreme Court would decide that electricity was a commodity, and that while we could not fix the price we could prohibit discrimination, or provide that there should be no discrimination?

Mr. GATCHELL. The Supreme Court could uphold this bill without discussing electricity as a commodity or as a service. It could uphold it upon the same principles as sustain the validity of the anti-trust laws against restraint of trade. A great many States, as in Nebraska, where Governor Shallenberger comes from, have laws providing that there shall be no discrimination which would restrain trade, and should Georgia attempt to regulate the situation described as existing at Cordele it could do so not only in the manner previously described but likewise under an act to prevent unfair competition.

Probably this will enable me to comply with the suggestion of the chairman to some extent in a brief manner, and apply the cases already discussed to the specific provisions of this bill. The main purpose of the bill seems to be inadequately covered by its specific provisions so that it is reasonable to assume the bill will be amended in committee and reference need not necessarily be made to the specific language now contained in the bill.

If there is a wholesale contract between the company transmitting the energy across State boundaries and a local distribution by another company, the Supreme Court might follow the Landon case. On the other hand, if the wholesale transmitting company and the local distribution company are one and the same, the Supreme Court might follow the East Ohio Gas Tax case. In either of these situations Federal regulation of the rates to consumers would apparently be excluded. It is pointed out, however, that it is a matter still to be decided by the Supreme Court, and if properly presented the result just stated would seem to be unsound.

The difficulties just mentioned serve only to reemphasize the legal puzzle to be solved before Federal and State jurisdiction can finally be determined by the Supreme Court, and it is hoped that additional study will enable Congress to pass upon the matter of Federal regulation of interstate commerce in a way that will preserve the rights of States, and at the same time maintain the national supervision and control so essential to that free flow of commerce designed to be guaranteed by the Constitution.

The CHAIRMAN. We are very much obliged to you, Mr. Gatchell.

Mr. GATCHELL. Thank you.

STATEMENT OF JOHN E. BENTON, GENERAL SOLICITOR OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, WASHINGTON, D. C.

Mr. BENTON. Mr. Chairman, my name is John E. Benton and my office is in the Otis Building in this city. I am general solicitor of the National Association of Railroad and Utilities Commissioners,

which represents in its membership all of the members of the State railroad, public utilities, and other regulatory commissions.

That association has an annual convention. It acts when not in session through its officers, and standing committees.

It has a standing committee on legislation, of which Hon. Andrew R. McDonald, of the Wisconsin commission, is chairman. I am here by his direction.

When last Monday I learned there was to be a hearing on the bill on Tuesday, I wired to him and he responded that it was impossible for his committee to appear, and directed me to present a request that his committee be afforded an opportunity to be heard at a somewhat later time. I have come here for that purpose. I wish, however, to preface the request with a brief statement intended to show why the request is made, and why State regulatory commissions will desire to be heard with some fullness before hearings upon the bill shall be finally closed preparatory to consideration of a report.

The declared purpose of this bill, let me say, is one which all regulatory officials, Federal and State, will be in sympathy with. The process of unrestricted competition through the selling and utility service at less than costs, for the purpose of destroying a competitor, whether that competitor is a privately owned or publicly owned utility, is demoralizing and, if it may constitutionally be done, should be restricted.

The question is whether, with regard to the field proposed to be covered by this bill, it ought to be done by the Federal Government or by the States.

The discussion of this bill thus far in this hearing by those who are avowed proponents, and by those who favor it, avowing themselves neither proponents nor opponents, but expressing judgment that it is in line with what ought to be done, considered from the standpoint of its purpose and disregarding its specific provisions—in short, the discusson of the bill, by those who have preceded me, has developed the fact that the bill goes far beyond the declared purpose of preventing unfair rate wars against municipally-owned electric utilities, and that it will operate to the substantial destruction of State rate making power over utilities covered by his bill.

I come from New England, where we believe in an indestructible Nation of indestructible States. When I appear here before this committee on a measure which proposes to transfer regulatory powers from State commissions to a Federal commission I am never surprised if I happen to find opposing me a Federal commissioner, but it is a somewhat novel experience to appear here on a bill of this character drawn and supported by distinguished citizens of Mississippi and Georgia.

As I say, the discussion of this bill brought out by interrogatories from the congressional committee has demonstrated that this bill as presented here would be destructive of State regulation. That has been demonstrated apparently to the satisfaction of Governor Shallenberger, who is a good Democrat, so he has brought in here this morning some amendments. I know that their design was to remove the criticism of the bill, but, if I may say so, they represent a change in verbiage without a change in the legal effect of the bill, as it would be declared by the courts. I want to look at them.

He proposes to strike out the words at the bottom of page 2 which empower the commission, having found discrimination, "to prescribe the rate or rates thereafter to be charged" and thus to make the act say that, having made that finding, the commission may "remove the unlawful element and such advantage, preference, prejudice, or discrimination resulting from such difference in rates to the extent not justified by a difference in costs."

Now, how can it remove discrimination except by prescribing rates which are not discriminatory in the judgment of the Federal Power Commission? Is it not perfectly evident that that is the only way discrimination could be removed by the commission?

Mr. Gatchell has suggested that the commission be not empowered to remove, but empowered to require removal; but the bill, as proposed to be amended by Governor Shallenberger, would retain lines 2 to 9 on page 3, which specifically provide that the procedure and practice in fixing and regulating the rates and charges of railroad companies under the transportation act shall be adopted and followed under this act.

In other words, the bill will provide that the commission shall adopt the very procedure which in the railroad field has destroyed the rate-making powers of States over their intrastate rates in large measure, almost reducing them to impotency.

Governor Shallenberger's second amendment would add a new paragraph, to the effect that:

> Nothing in this act shall be construed to enlarge the power of or to grant additional power to the Federal Power Commission with respect to the establishment of reasonable rates per se, or to establish the value of the property of any person as defined in (7), (e), or the reasonableness of the return thereon; nor to abridge the jurisdiction of any State to fix reasonable rates per se on intrastate business.

In other words, he would add an amendment saying that nothing in the act shall be construed to enlarge existing powers or to grant additional powers to the Federal Power Commission.

How can two conflicting provisions stand in the act, and have effect, one saying that the commission may find discrimination and remove it in the same way that the Interstate Commerce Commission removes discrimination in railroad rates, and another section which says that nothing in the act shall enlarge the power of the commission?

The court would be confronted with two provisions, one purporting to withhold power, and the other to grant power, and it would say that the provision as to State jurisdiction was intended merely to preserve the power of the State commissions over those companies to which this act did not apply—that certainly Congress did not do a vain thing—that it did not intend to pass a bill purporting to give power to the Federal Power Commission without giving it.

So while Governor Shallenberger, with the aid, as I understand, of counsel for the proponents of the bill, has attempted to meet the objections which have been pointed out by interrogatories from the committee, in my judgment as a lawyer—which may be worth much or little—his proposed amendments would in no respect meet those objections, but the bill would be just as destructive with those amendments in as with them out.

Mr. SHALLENBERGER. Mr. Benton, may I ask you, as to the first part, whether you object to the power being given and you say that that practically nullifies the State commissions' powers and if that were not applied by the Supreme Court in the railroad cases, notwithstanding the fact that it did destroy the power of the railroad commissions, the courts have sustained that power, and you can not question that any longer.

Mr. BENTON. I, a long time ago, got to be very careful about saying that this Congress, or that the Federal Government, can not do this or can not do that. I do not know the extent of the powers of Congress under the commerce clause. Of course, the Supreme Court has sustained the transportation act. The question here is whether the Congress now wants to enter the public utility field and work the same destruction of State regulatory power there which has been produced by congressional enactment, and by construction of the courts in the railroad field.

The CHAIRMAN. Mr. Benton, let me ask you what have the States done about these things? Have any of the States done anything about it?

Mr. BENTON. Which things are you now talking about?

The CHAIRMAN. About these very matters we are talking about here, regulation of the service and power.

Mr. BENTON. Thirty-nine States regulate the distribution of electricity through their commissions. Nine States do not. I can give you the names of those States if you want them.

The CHAIRMAN. I would like to have the names of those States. How about Texas?

Mr. BENTON. Texas is one that does not regulate electric rates through a State commission.

The CHAIRMAN. I know our little town governments are sitting there trying to fix rates, with these experts that these power companies send in there, and who go out and sit with them. They can not even argue with them.

Mr. BENTON. The States which have not yet granted power to their State commissions to regulate electric utilities, but continue to regulate through municipal councils, are Florida, Iowa, Kentucky, Minnesota, Mississippi, South Dakota, Texas, and New Mexico. Delaware has no State commission.

Nebraska has, I think, granted to its commission power to regulate, but only outside incorporated cities and towns.

Mr. SHALLENBERGER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. These States you say that are already attempting to regulate power companies by their local commissions? Are they granted power to prevent unfair competition? Do they deal with the same subjects as are contained in this bill?

Mr. BENTON. I have not have an opportunity to learn from the several commissions the number which are restricted to the making of "maximum" rates. Generally the commissions are granted the power to fix "just and reasonable" rates, and there are a considerable number of decisions, reviewed in a case very lately decided—that of the Great Northern Power Co. *v.* Public Service Commissioners of Montana, reported in 52 Fed. (2d) 802—which hold to the

effect that a grant of power to a commission to fix "just and reasonable rates" is a grant of power to fix a rate which shall be both a maximum and a minimum rate.

I may say that in the case just cited a three-judge Federal court held that the company, if not making a fair return, had the same right to exercise its judgment that its return would be increased by reducing the rate and to reduce it that it has to insist upon an increase in its rate when its return is adequate. I think that case will probably reach the Supreme Court, and we shall have a decision from that court upon that very interesting question.

Mr. HOCH. In the Georgia case—do you believe that the State of Georgia could and should correct the abuses to which reference has been made, and should do it by fixing a minimum rate?

Mr. BENTON. I believe there is no question about it.

I believe there is no question whatsoever as to the power of the State of Georgia to do that, and that it should do that, if the abuse calls for a remedy. That is my personal opinion.

Mr. HOCH. Assuming the abuse to which the proponents of this bill have made reference, what do you say that the State of Georgia should have done in the premises?

Mr. BENTON. The State of Georgia should have vested authority in a proper regulatory tribunal to fix the rates of utilities upon a just and compensatory basis.

Mr. HOCH. Well, that would mean in that particular case fixing a minimum rate with reference to Crisp County, Georgia, would it not?

From what has been said here in that particular case, the Georgia Power Co. reduced its rates 35 per cent, if I remember, in Crisp County, Ga., and maintained higher rates in other counties in the State.

Mr. BENTON. Mr. Hoch, I have indicated that that sort of competition is destructive and demoralizing. I think the regulatory power of the State should be exercised to restrain one utility from seeking to destroy another by selling service at far less than its cost, by determining what the fair rate should be, and by prescribing it.

Mr. HOCH. That means fixing the minimum rate, does it not?

Mr. BENTON. Yes.

Mr. MAPES. In other words, that situation could be taken care of by the State commissions generally in these 38 States which authorize the State commissions to regulate the rates. Is that right?

Mr. BENTON. Yes, Mr. Mapes. And it may also be done in any other State which feels that the business of supplying electrical service ought to be regulated.

Mr. MAPES. It may be done by the other States if they pass the necessary laws.

Mr. BENTON. If they want regulation.

Mr. MAPES. Yes.

Mr. BENTON. If they do not feel the need of it sufficiently to lead them to enact the legislation, the presumption is that the need does not exist. It may be that they are subject to malign control by corporate interests within their boundaries by which they are dominated, but we refuse to believe that either as the State of Georgia or as to the State of Mississippi or any State.

Mr. MAPES. Assuming that the 38 States do, the other 10 can if they want to.

Mr. BENTON. Yes.

Mr. BULWINKLE. Let me ask you a question. Did you go before the Georgia commission on this case?

Mr. BENTON. That question is directed to me?

Mr. BULWINKLE. Yes.

Mr. BENTON. I know nothing about that case, except what has been stated here.

Mr. HOCH. Do you think there is any question but that the power of Georgia exists to prescribe the rates of that Georgia Power Co., even though the current comes from outside the State?

Mr. BENTON. There is no question about it whatever, Mr. Hoch. I was about to point out why I thought so.

Mr. SHALLENBERGER. Have you any court opinions or authorities?

Mr. BENTON. I was about to cite some cases.

Mr. SHALLENBERGER. That is what I was going to say, because I think that is the basis of this whole bill.

The CHAIRMAN. Will you pardon me, Mr. Benton?

May I break into your statement right here?

Mr. BENTON. Yes.

The CHAIRMAN. Maybe some of these other gentlemen could tell us what was done down there.

Mr. DRAYTON. They got an injunction down there in the Federal court, declaring that the power of the Georgia commission was limited to prescribing the maximum rates and that the company could go ahead, and go as far as they did under that case that you have referred to, that they could go ahead and proceed in this one county to the extent necessary to do it.

The CHAIRMAN. The court did not hold that the Georgia Legislature did not have power to pass any other law.

Mr. DRAYTON. No.

The CHAIRMAN. Under the Georgia law that they have now, that is all they can do?

Mr. DRAYTON. That is all they can do.

The CHAIRMAN. But the court did not say that Georgia could not pass a law fixing a minimum rate?

Mr. DRAYTON. No, sir.

Mr. BULWINKLE. Mr. Chairman, may I ask a question along that line?

The CHAIRMAN. Mr. Bulwinkle.

Mr. BULWINKLE. Did they go before the Georgia commission?

Mr. DRAYTON. Yes, sir; they went before the Georgia commission.

Mr. BULWINKLE. Have you a copy of that Georgia decision or the decision in that case?

Mr. DRAYTON. Yes, sir.

The CHAIRMAN. Judge Garber raises a question there, Mr. Benton, which he desires to ask.

Mr. GARBER. Along the same line that has been referred to here: Has anyone anywhere recognized the power given, or the jurisdiction of the States, as set out in section 20 of the Federal power act, in the following language:

Any whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission.

There is a distinct delegation of power as such that might be reserved to the several States, as I construe it, to exercise the power of the Federal commission in regard to their State regulations and control.

Has that ever been called in question or denied by any of the authorities?

Mr. BENTON. I am not aware of any case where the Federal Power Commission has sought to exercise its rate-making power.

I would like to ask Mr. Drayton about the Georgia case. I do remember that a year or two ago the Georgia Power Co., having reduced its rates in a certain area, the Public Service Commission of Georgia issued a show cause order, requiring the company to show cause why it should not make the same reduction throughout the State.

Mr. DRAYTON. Yes.

Mr. BENTON. And I think in that particular case the court enjoined further action by the public service commission.

Am I right about it?

Mr. WILLIAMS. Yes, sir.

Mr. BENTON. That is this same case?

Mr. DRAYTON. Yes. I think it is.

Mr. BENTON. I did not remember the name of it.

Mr. HOCH. Suppose the Georgia Power Co. does not distribute the current locally, but distributes it over high power lines to the gate in various cities in Georgia and provides a different rate in one case from another for that wholesale power, would you say that the State commission in Georgia would have the power to prevent discrimination?

Mr. BENTON. No; I do not say so. May I withhold discussion of that?

Mr. HOCH. I do not mean under the present law.

Mr. BENTON. I do not say, though, that any State can exercise control over the wholesale price for electrical service, or for the commodity of electricity, whichever you regard it. I am coming to that in a moment, if I might withhold discussion of it.

I want to say, Mr. Chairman, that the State commissioners ask the opportunity to place before you rather fully evidence of State commissioners as to the number of electric distributing companies which would be brought under the Federal regulation provided by this bill. If it becomes a law, it will, as has been pointed out, cover all of the companies which distribute any energy generated on Federal projects. We want to show how many that will probably be.

Then, as has been pointed out here, it will cover every company that has any part of its distribution system extending across State boundaries. I do not know how many that would cover, but it would cover a very great number.

Then we want to show you how many or how few there are of these Crisp County, Ga., situations, which the proponents of this bill think make necessary this legislation.

And we want to show you the extent to which the enactment of this bill, and the imposition of the regulation which it provides upon the number of companies to which it will apply, will upset State regulatory systems which have been established under State statutes and sustained by State and Federal courts.

I am referring to those States which by their laws have provided that municipalities shall be the units within which regulation shall take place.

Mr. Gatchell has referred to a very recent case in which the United States Supreme Court has sustained the right of a State to make that provision.

Obviously that system of rate making could not continue if this act takes effect.

In brief, we want to collect and place before the committee the data upon which the committee can base an intelligent determination as to whether there is a national need to be met by such legislation as this, and as to the extent to which the enactment of the legislation would work to the public injury rather than to the public good.

Now, while this particular bill has not been specifically acted upon by the National Association of Railroad and Utilities Commissioners in convention, the general attitude of the association toward legislation of this character, and the reason for that attitude, were declared in a resolution adopted in 1929, which I will read, as follows:

Resolved, That whereas under the principle established by the United States Supreme Court in Pennsylvania Gas Co. *v.* Public Service Commission (252 U. S. 23), State authorities, in the absence of Federal legislation, retain power to regulate local service of utilities which operate across State lines, including the rates for such service, this association asks Congress not to interfere with the continued exercise of that power as to any class of public utilities by legislation vesting power to regulate such service and rates in any Federal tribunal.

It has been said here by the avowed proponents of this bill that it will not interfere with State regulation. On the other hand, it has been admitted here by the able Solicitor for the Federal Power Commission that the bill broadly extends the power of that commission.

It is a law of physics that two bodies can not occupy the same space at the same time, and it is constitutional law, as declared by the United States Supreme Court, that

It is the nature of the Federal power that where it exists it dominates.

To the extent that this bill provides for the exercise of Federal power in prescribing the rates of electric utilities, it must necessarily displace State regulatory agencies and destroy their power to regulate electric rates.

The States now have complete power to regulate the charges of electric companies to those who take electric service, even though such service may be supplied across States lines.

It may be well to refer to decisions of the United States Supreme Court which make this clear. The leading case is cited in the resolution which I have just presented.

The CHAIRMAN. Yes, sir.

Mr. BENTON. The Pennsylvania Gas Co. case was one involving gas piped by the company from Pennsylvania into New York and there sold directly to consumers.

The New York Public Service Commission prescribed rates which the company contested as an unconstitutional regulation of interstate commerce. I quote from the unanimous opinion of the court:

We think that the transmission and sale of natural gas produced in one State, transported by means of pipe lines, and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. * * *

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us. * * *

In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress to permit the States to pass laws indirectly affecting such commerce when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject matter for itself. In varying forms this subject has frequently been before this court. * * * "Where the subject is peculiarly one of local concern, and of its nature belongs to the class with which the State appropriately deals in making reasonable provisions for local needs, it can not be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care and for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the interstate commerce act expressly withholds the subject from Federal control. * * *

The thing which the State commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to such factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city. * * *

This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution.

Now, if Congress enters the field of electric-rate regulation and imposes certain regulations by this bill, it, by that act, displaces all State regulations affecting electric rates. Congress is the judge as to the extent to which the regulation is necessary and the regulation which the Congress provides through this bill, if it is enacted, will be the only regulation affecting interstate rates of electric companies, wholesale or retail.

Mr. SHALLENBERGER. Mr. Benton, I would like, on that point, to ask you for your interpretation of this bill. Mr. Garber read to you section 20, which this seeks to amend, and the language plainly indicates, as I read that section, that the power to intervene, even to regulate licensees, only applies where the State itself does not have a regulatory body, so that the field of possible conflict is reduced there. The Federal commission will not interfere where there is a commission in the State.

Why does not that remove the objections that have been made?

Mr. BENTON. Governor Shallenberger, I tried to point out in reading your amendments to this amendment, that you retain the provision that the Federal Power Commission may find "discrimination"—which, by this act is made clearly to be a difference in rate levels—and may remove that discrimination, and your bill says it shall remove it in the same manner that the Interstate Commerce Commission removes discrimination which it finds in railroad rates.

Now, having added those provisions to the Federal Power Commission act, the courts will say you intended to do what you said you were doing.

Mr. SHALLENBERGER. You undoubtedly listened to Mr. Ryan's statement and views on this, and I asked him particularly on that very point. As I understood him, he said that they did not have the authority to interfere in States where the State commission was authorized to act.

Mr. RYAN. Governor Shallenberger, may I say——

Mr. SHALLENBERGER (continuing). And that was the intent and purpose of this bill.

Mr. RYAN. Well, I intended to state that I understood from the proponents of the measure that its purpose was to exclude Federal jurisdiction where there was a State power commission.

Mr. SHALLENBERGER. That is the point.

Mr. RYAN. But the point I made yesterday was that it seemed to me that the bill did not actually exclude it.

Mr. SHALLENBERGER. We intended to clarify that; Mr. Benton, do you think we did?

Mr. BENTON. Mr. Shallenberger——

Mr. SHALLENBERGER. I might say that we are honestly seeking to meet the objection you have made.

Mr. BENTON. Mr. Shallenberger, I do not question it at all; and, of course, it can be done.

Mr. SHALLENBERGER. In the wisdom of this committee I know it will.

Mr. BENTON. But I do not think that it has been done here.

Mr. SHALLENBERGER. You do not think that we have done it yet?

Mr. BENTON. I do not think that these amendments do it; no.

Mr. SHALLENBERGER. That is all I wanted to ask.

Mr. BENTON. Now, in the case of Missouri ex rel. Barrett *v.* Kansas Natural Gas Company (265 U. S. 298), which has been cited here by Mr. Gatchell, the Supreme Court held that the power to regulate did not extend to wholesale quantities—to sales by a generating company in wholesale quantities to a distributing company. That case establishes that the limit of the State's power to regulate is the power to regulate the customers' rates.

Mr. NELSON. In that case you are referring to the wholesale company, where the product was coming into a State?

Mr. BENTON. Yes; that is the case.

The next case I cite is the Attleboro Electric Company case (273 U. S. 683). That case is cited, first to show that the rule laid down in the Pennsylvania Gas Company case applies in the electric utility field; and, secondly, to show that the court in that opinion clearly recognized the continuing force of the rule laid down in the Pennsylvania Gas Company case.

This rule was very clearly stated again in a case reported in the United States Daily only the day before yesterday—January 31, 1933.

The case was Wichita Gas Company *v.* Public Service Commission, decided in the district court of Kansas by Judges Phillips, McDermott, and Hopkins. I quote from the opinion:

> It has been settled by repeated decisions of the Supreme Court that the State commission has no power to fix and regulate interstate gas rates. Hence, a State commission can not fix the price for natural gas transported from one State to another and sold and delivered in bulk to an independent distributing company. Missouri ex rel. Barrett *v.* Kansas Gas Company (265 U. S., 298); Peoples Natural Gas Company *v.* Public Service Commission (270 U. S., 550); Public Utilities Commission *v.* Attleboro S. & E. Company (273 U. S., 83); Pennsylvania Gas Company *v.* Public Service Commission (252 U. S. 23); Public Utilities Company *v.* Landon (249 U. S., 236).
>
> On the other hand, a State does have the power to regulate the price of gas brought into a State and sold directly to the consumer, because the business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distribution companies.

Mr. BURTNESS. Mr. Chairman.

The CHAIRMAN. Mr. Burtness.

Mr. BURTNESS. On that point—if this has been covered I do not want to take up your time—I have not been able to be here all of the time—I do not just get the real meat, the legal distinction between the power of the local commission to control—the power, of the State, I will say—to control and regulate consumers' rates as distinguished from the power of the State—I will put it lack of power of the State—to regulate wholesale rates, where the contract for the sale is partly on contracts.

Could you in just a sentence or two point out the real legal distinction between the two? I can not get that.

Mr. BENTON. Mr. Burtness, I could not do that if I had all day.

Mr. BURTNESS. Is there anything, in your judgment, any legal distinction between the two? I can not get it, just sitting here listening.

Mr. BENTON. I know what the court says. The court says that the sale to the consumer is a local matter, that it is one of local interest such as would properly be regulated by local authority; that the sale from the producer in one State to a company that distributes in another State does not immediately concern the people of the community, so as to be a matter of local interest; that that is a matter of interstate commerce, properly to be regulated by the Federal Government, and beyond the reach of the States.

Now, Mr. Burtness, beyond that I can not go.

Mr. BURTNESS. I can see how a wholesale contract made by an organization outside the State to distribute power taken in to the State is affected, but I can not follow the reasoning entirely in the other case.

Mr. BENTON. Pardon me, please.

Mr. BURTNESS. In the case of a contract in a locality, or a State, a contract under which the foreign concern has bought power from another State, but is actually operating within the specific State, in so far as making the contract to sell its wholesale power within the State itself is concerned, I can not see any real distinction between that situation and the selling to consumers.

Mr. NELSON. We had a case cited here covering that situation and that decision did make a distinction. Now, I do not know whether you were here or not.

Mr. BURTNESS. No; I was not here.

Mr. NELSON. The case held that when this gas was delivered to a distributing company, it was stepped down or made weaker.

Mr. BENTON. They reduced the pressure.

Mr. NELSON. And that changed the character of the commodity, and was construed as breaking the original package. It ceased to be interstate commerce, and became something else.

Now, in the case of wholesale it would still be interstate commerce, because the character has not been changed, and that is selling in the original package.

Mr. BURTNESS. Of course, I am trying to limit my question to cases where the interstate commerce clause does not seem to directly cover it. That is, as to these electric contracts.

Mr. NELSON. Well, Mr. Burtness——

Mr. MAPES. Is there any claim that the State commission does not have control over the prices if it is entirely within the State?

Mr. BENTON. No, sir.

Mr. BURTNESS. I understand that the general holdings are that they would have no control over wholesale contracts.

Mr. NELSON. I think not.

Mr. BURTNESS. As I understand it, I do not understand that there is any such claim here. I do not know that I understand it.

Mr. BENTON. I stated the law to be this, if a distributing company in Boston extends its lines to Providence and buys its power in Providence, it is nevertheless an interstate contract beyond the regulation of the State. That is settled in the cited case, the Attleboro decision.

Mr. MAPES. You get into an interstate question there.

Mr. NELSON. I thought that that was what you were referring to.

Mr. BENTON. I thought that was your question.

There is no question about the power of a State to regulate the rates from a producing company to a distributing company, where both are within the State and the production is within the State.

Mr. BULWINKLE. Mr. Benton, may I clear this up, because, as you must have spent some time on it, I would like to know something about it, even if it takes one of these other gentleman to answer it.

I want to get back. Do you know of a single other case yourself besides this Georgia case in which there is any demand for any legislation to be enacted——

Mr. BENTON. No, sir.

Mr. BULWINKLE (continuing). In the United States, besides this Georgia case, which indicates that this legislation should be enacted?

Mr. BENTON. I do not want to be put in the position of saying that it should be enacted for that case; but I know of no other case which has arisen.

Mr. BULWINKLE. All right.

Mr. BENTON. Where there is no existing tribunal having jurisdiction to regulate it.

Mr. BULWINKLE. Now, I want to ask you this, in order to clear it up in my own mind and for information. It may be that some of these other gentlemen may have to answer it.

This was a case in which the Georgia Power Co. owned the plant at Cordele, Ga., did it not?

Mr. DRAYTON. I do not know. There was a plant there.

Mr. WILLIAMS. What is that question?

Mr. BULWINKLE. The Georgia Power Co. owned a plant there at Cordele, Ga.?

Mr. WILLIAMS. No, sir.

Mr. DRAYTON. They were selling electricity there.

Mr. BULWINKLE. They were selling electricity there?

Mr. DRAYTON. Yes.

Mr. BULWINKLE. But they had an investment of something over $100,000 in that city; is that correct?

Mr. DRAYTON. Well, that was a municipal plant that came in there.

Mr. BULWINKLE. No; before the municipal plant come in.

Mr. DRAYTON. Mr. Williams, can you answer that?

Mr. WILLIAMS. They had an investment in a distribution system in Cordele.

Mr. BULWINKLE. All right; of something over $100,000.

Mr. WILLIAMS. Yes.

Mr. BULWINKLE. Then they said or decided that they were going to sell power and they built a municipal plant.

They already had service from the Georgia Power Co.; is that correct?

Mr. WILLIAMS. Yes, sir.

Mr. BULWINKLE. Then, after the city built a power plant, the city reduced the rate 10 per cent, first.

Mr. WILLIAMS. Yes, sir.

Mr. BULWINKLE. Then, after that was done, and after a continued rate war, which was continued between the city and the Georgia Power Co., the Georgia Power Co. reduced its rates 35 per cent.

Mr. WILLIAMS. Yes, sir.

Mr. BULWINKLE. Then the Public Utilities Commission of Georgia served an order to show cause on the Georgia Power Co. why these rates in effect at Cordell should not be in effect all over the State of Georgia.

Mr. WILLIAMS. Yes, sir.

Mr. BULWINKLE. That is the case which went before the Georgia Power Commission and it was held that, by the commission in Georgia, that it had the right to fix the maximum rates under the law, not to exceed maximum rates, but they had no right to fix minimum rates. Am I right or am I wrong in that?

Mr. WILLIAMS. That was in effect; yes, sir.

Mr. BULWINKLE. And so, after all, this whole bill, as brought here before this committee, is nothing more or less than a bill brought forth, because there is a rate war in Georgia between the Georgia Power Co. and the municipally-owned plant at Cordele?

Mr. WILLIAMS. No, sir; not by any means. May I answer that?

Mr. BULWINKLE. Yes.

Mr. WILLIAMS. A little bit at length?

The CHAIRMAN. I do not know about that.

Mr. BULWINKLE. I want to get your comments. Am I right or wrong?

Mr. WILLIAMS. No, sir; you are entirely wrong.

Mr. BULWINKLE. On all my statement that I have made?

Mr. WILLIAMS. No; no; just the last statement as the reason for bringing up the bill.

Mr. BULWINKLE. That is, just about the rate war?

Mr. WILLIAMS. That was brought up here, just as an illustration, as to conditions at Cordele to show that the threat is not imaginary but real. It has nothing in the world directly to do with this bill. The bill is not brought here with the thought in mind just to remedy the Cordele, or Crisp County case. I never expect, nor do any of my associates, so far as I know, ever expect to be in Crisp County, or have any connection at all with Crisp County, Ga.

The point is this: That this sort of thing affects the Nation. That is, the people as a whole, in the amount of about $750,000,000 per year, and I can demonstrate it in about five minutes, I think, to the satisfaction of the committee.

The CHAIRMAN. All right, Mr. Benton, proceed.

Mr. SHALLENBERGER. Mr. Chairman, just one minute.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. Mr. Williams had prepared this statement and I told him that I did not think that we would have time to hear him read it. He has discussed two or three questions in it, and I would like to have it in the record. I told him I would ask to have his statement published in the hearings.

The CHAIRMAN. That is perfectly all right.

(Mr. Williams's statement follows at the end of the hearing.)

Mr. NELSON. May I ask Mr. Williams one question?

The CHAIRMAN. All right.

Mr. NELSON. Right in connection with what he said. You said that the legislation did not originate out of the rate war in Georgia.

Mr. WILLIAMS. Yes.

Mr. NELSON. Now, from what source does the demand for this leigslation come?

Mr. WILLIAMS. No; I think you are misinterpreting what I said, or what I intended to say. I say that the need for the bill is not simply because of a rate war in Georgia. I simply used that rate

fight as an example. It happened to be convenient because I felt that if the Georgia Power Co. had this right, or claimed this right, and if they have this right, I could see plainly that no municipality, no private company, could hope to go into competition with a company having the right to use that unfair device and consequently this case gave me the illustration of what I already knew. They had threatened to do that, and did do it; but I can say there are others doing it, or threatening to do it, and will exercise that right.

The CHAIRMAN. Very well, Mr. Benton.

Mr. BENTON. Now, the striking feature about this bill is that it appears to have been adroitly drawn with the purpose of going just as far as it is possible to go in the destruction of State power of regulating all companies affected. Instead of directly granting power to regulate interstate rates, it bases the jurisdiction given the commission upon findings of discrimination to be made by the commission, just as the Interstate Commerce Commission, under the transportation act, is empowered to make intrastate railroad rates.

Now, it is public knowledge that the power of State commissions to regulate intrastate rates has been practically destroyed by those very provisions of the transportation act.

This bill proposes to import into the Federal power act the same language and the same procedure. Whenever the power commission has found discrimination, it is to remove it by prescribing Federal rates.

And this bill goes further. Instead of leaving the power commission to determine whether there is genuine discrimination or not, it creates statutory "discrimination," which is made a mere difference in rate levels.

Let us take the State of Indiana, for example, which State makes the different municipalities the units for rate making. Inevitably, after investigation in the different municipalities, with different plant investments, different operating conditions, and amounts of business, there is going to be variation in rates in these different municipalities. This bill declares every such variation a prima facie discrimination, and upon that prima facie showing, if there be no other evidence, the Federal commission may enter and abolish the discrimination by prescribing the rates—and not the interstate rates only but the intrastate rates—all the rates of the company.

To be sure the State commission may fight a lawsuit against the assumption of jurisdiction by the Federal Power Commission with the Federal Power Commission as the judge. If it does, the question whether there is discrimination which gives the Federal commission control will depend upon whether the variation in rates is justified by a difference in the cost of the service.

Now, there is not any such a thing as a fixed and certain cost of service. Cost of service found at any time is only an estimate by the commission, based upon conflicting evidence of expert engineers, who testify as to reproduction costs and costs of operation, and as to the length of time in the future that generating systems and other items of the physical plant will last; and it would be a miracle if any two commissions reached exactly the same conclusion as to the cost of service in any community.

If the Federal commission, however, should reach a different judgment on that in any respect and by any fraction, from the State commission, the difference in rate levels in the two communities fixed by the State commission would stand as "discrimination," and the Federal commission would take possession of the field, ousting the State commission.

I was surprised to hear the proponents of the bill say yesterday that the valuation of plants would not be necessary. They can not have had the terms of the bill in mind. What does the act say? It says that it shall be unlawful to sell or offer for sale electrical energy in one community at rates higher than another unless it is justified by a difference in cost as referred to in (7) B, and (7) B says:

> In determining the cost to deliver electrical energy in any community the property of the seller or any person affiliated with the seller, alleged to be used and useful in delivering electrical service to that community, shall be properly allocated to that community—

And then that there shall be included in that the depreciation and—

> a reasonable return upon a property value properly allocated to that community from the total aggregate property value.

So they unquestionably must value the property.

Mr. WILLIAMS. You never finish reading——

The CHAIRMAN. Wait a minute. We can not allow interruptions.

Mr. BENTON. You could not possibly have a bigger valuation proposition that that. For example, let us assume three companies, A, B, and C, all controlled by a common holding company, and thus affiliated.

Company A generates power in a neighboring State and sells to Companies B and C in different communities. A State commission establishes a 5-cent rate for company B as yielding a fair return on its property, while for company C, operating under more favorable conditions, it establishes a 4½-cent rate in another community. Under this statute the variation creates a prima facie case of discrimination. It is brought before the commission. The State commission comes in and wants to defend. What has it got to do? It has got to have a valuation of the A company property, of its generating plant and transmission lines, and of the entire plants of B company and C company, and it has got to be prepared to allocate the proper fraction of the three properties as valued to each of those communities. The State commission can not do that. It will not have the funds. The Federal Power Commission, if it administers this law according to its terms, will have to value every property which distributes or which transmits or generates electricity which is sold by a company subject to this bill.

What it will cost nobody can guess. I want to remind the committee, however, that when the railroad valuation bill was before Congress there was an estimate as to what it would cost. Judge Prouty estimated it at $5,000,000. Commissioner Lewis testified the other day that the cost to the commission to date has been $44,000,000, and to the railroads, I think, $137,000,000.

The CHAIRMAN. Now, you may extend your remarks in the record. We will have to adjourn now.

Mr. BENTON. Thank you.

Mr. BULWINKLE. May I ask one more question?

The CHAIRMAN. Mr. Bulwinkle.

Mr. BULWINKLE. Mr. Benton, representing, as you do, the railroad and public-utilities commissions of 37 States, is there any necessity for this legislation?

Mr. BENTON. In my judgment, there is none whatever.

Mr. WILLIAMS. Mr. Chairman, in accordance with the privilege granted me to extend my remarks, I wish to say that the discussion of the bill so far has brought out, both by remarks of the members of the committee and by the testimony of the witnesses on both sides, that there seems to be a general agreement that the action of Georgia Power Co. at Cordele, Ga., which has been described before the committee, was a glaring abuse of power and should be corrected. What has seemed to me to be troubling some members of the committee is the remedy which should be applied, viz: Should the Federal Governent act to outlaw the abuse or should it be left wholly to the State to deal with it? No criticism of the bill was made by any witness on the ground that in attempting to remedy one abuse practiced against a municipality the opportunity had been created to practice another abuse against a private corporation. The purpose of the bill and its essential fairness in affording protection to all parties that would become subject to its provisions did not seem to me to be questioned by anybody present.

I would like to aid in resolving the doubt which seemed to be in the minds of some members of the committee as to whether the subject matter of the bill was of any national importance as distinguished from a purely local interest and as to whether the abuse sought to be remedied was not so isolated and so unusual in occurrence as to make its consideration by Congress unnecessary in protecting the public interest.

It is not claimed that the amount of the money damage in Crisp County, Ga., as the result of an abuse of power by Georgia Power Co. is of national importance. What is of national importance is the fact that an industry, national in scope, has, through one of its important constituent parts, claimed and has been permitted to exercise a power which, if not restrained by national action, will give to the present national de facto monopoly of electric supply the force of a legal monopoly. It is contrary to public policy, if not to law, to create legal monopolies. De facto monopolies are not contrary to public policy if not based upon unfair practices or an abuse of power, financial or otherwise. But when large monopolistic corporations of national scope and importance undertake to preserve a de facto monopoly by unfair practices and the abuse of great financial power, they should be restrained by national authority. No other authority is broad enough to effectively deal with that situation.

Consider the position of a municipality which, having been competently advised, is convinced that it could build a municipal electric enterprise and deliver electrical energy to its citizens at very much less than the rates being charged with the approval of a State regulating agency, by a large private electric utility belonging to one of the large national groups. It seeks the aid of municipal bankers, substantially all of whom do business upon a national scale, and are informed as to the practices of private electric utilities in dealing with municipal competition actual or potential. The Crisp County situation has been widely advertised. The Wall Street Journal, widely read by bankers, called specific attention, without deploring it, to the 35 per cent cut in rates by Georgia Power Co. as a means of dealing with a new municipal enterprise. Bankers were thus warned that money advanced by them for a new municipal undertaking would be hazardously invested. They were warned that the full financial power of a national group of public utilities would be used, at whatever local cost, to maintain the existing de facto monopoly of national scope. They would know that it was not necessary that a local loss should be recouped in a given State by revenue from higher rates elsewhere in that State alone. They would know that a reservoir of money derived from higher rates in many States could be tapped to recoup a local loss in a given State. It must be obvious, therefore, that the aid available to be brought to support an unfair local competition is national in origin. It may be asked, could not the bankers examine the laws of the particular State in which is located the municipality seeking financial aid and find out whether in that State the law does not declare that electric rates shall be just and reasonable and nondiscriminatory? And if they did could they not safely lend their money to the municipality if convinced of the economic soundness of the enterprise under fair competitive conditions?

Perhaps the banker who supplied the money to Crisp County examined the laws of Georgia and found that they provided, as they do, that electric rates should be nondiscriminatory, and took that provision as declaring unlawful the system of rates declared unlawful in the bill, H. R. 14516, now before the committee. If he so interpreted that provision he has found out since that the lawyers of Georgia Power Co. interpreted it differently and that their interpreation was acquiesced in by the State regulatory agency. This fact is sufficient to put municipal bankers on notice that a provision in a State law that rates shall be nondiscriminatory might not be sufficient to protect their investment against the use of the destructive power used in Crisp County, Ga. It is proverbial that money is timid and that bankers are most reluctant to buy into a lawsuit.

If it is a matter of any national importance that municipal bankers whose business is national in scope should have a clear and specific protection against the abuse of financial power by great corporations exercising a de facto monopoly on a national scole, then it seems to me that what happened in Crisp County, Ga., can not be regarded as merely of local or State importance but must be regarded as a proved instance of an abuse of power of truly national importance.

A clear and explicit declaration by Congress outlawing the abuse of power practiced in Crisp County, Ga., will reassure municipal bankers and give them courage to come to the aid of municipalities. It will with certainty protect their investments in municipal electric enterprises from the destructive power of the bludgeon used in Crisp County, Ga.

The enactment of the proposed legislation will constitute a national declaration of policy which will eliminate an evil threat, national in scope, made by de facto monopolistic corporations of great financial strength operating on a national scale. A national declaration that the abuse of power practiced by Georgia Power Co. in Crisp County, Ga., is contrary to the national interest and

unlawful will remove from the field of legal controversy whether or not that abuse of power was in fact the exercise of a power to maintain discriminatory rates. The possibility that in different States that important question might be decided differently indicates the necessity for a national declaration if fear is to be removed from the minds of municipal bankers approached to finance municipal electric undertakings.

It does not seem to me that the test of the national importance of this question should be the number of situations similar to that of Crisp County which can be pointed to. That there are not many such situations is not surprising. What is surprising is that there should be one such case in which the facts are admitted in open court by the aggressor. A surprising circumstance is that the threat of the use of the described method of unfair competition was not sufficient to prevent the creation of even one competitive municipal electric undertaking.

As a matter of fact, I have been informed on reliable authority since I testified the other day that there are other cases similar to the Cordele case. One such case has arisen in Chairman Rayburn's own State and will soon come before the Federal Trade Commission. Moreover, there are several other municipal plants which have been driven out of business by the unfair competition of private corporations. The Fairbanks-Morse Co. for years has offered to sell to municipalities on the installment plan power-generating machinery, agreeing to take their compensation out of the savings resulting to the community from the lower costs. The private power companies, however, have reduced their rates at these competitive points to such an extent as to drive the municipal plants out of business or so cripple them financially that they would be put in a position where they could not make any payments to the above said company. There are besides the case already referred to in Chairman Rayburn's State three or four other similar cases in Texas. There are several others in other parts of the United States. There is one pending in Lockport, N. Y., which has no connection with the Fairbanks-Morse Co., but which is a glaring case where the private company intimidated the municipal officials and kept the plant from being operated.

It was not the purpose of the sponsors of the bill to limit, impair, or abridge the general power of State regulatory agencies to fix rates. The bill empowers the Federal Power Commission to intervene only when State regulatory agencies permit to exist the discriminatory relationship between two rates which is declared unlawful by the bill, viz, a difference between the rates for a like service not justified by a difference in cost.

Until such a difference has been proved the Federal Power Commission could not intervene, and it could intervene then only if the seller were a licensee or an interstate company, and if the seller were an interstate company only if said difference in rates should prejudicially affect interstate commerce.

The bill is declaratory of a national policy to outlaw rates of the described discriminatory character and it goes no further in granting power to the Federal Power Commission than is necessary to make effective that declaration. State regulatory agencies which fix

intrastate rates in harmony with that declared policy could not have their rates interfered with by the Federal Power Commission unless upon proof that the rates prejudicially affected interstate commerce—a condition which the State regulatory agency is without power to correct.

Therefore upon a careful analysis of the provisions of the bill it becomes apparent that there is no proper basis for the statement that the proposed legislation would exclude the State regulatory agency from fixing rates and destroy it, and no basis for a statement that the bill could result in any interference with a proper exercise by any State regulatory agency of its rate-fixing function.

I have stated elsewhere that it is not the purpose of the proponents of this bill to take from the State authorities any power which they can properly use as a State power, much less destroy the State agencies, as has been suggested. Of course, if that authority has caused an unjust discrimination, then the discrimination must be removed even if some power of the State commission is abridged because it would be evident that such power had not been used properly and the State would be impotent to correct it.

Let's take two adjacent States, we'll say Georgia and Alabama, and we'll assume—leaving out for the present the question of whether or not the company is a licensee—that the company or its affiliate operates in both States, serving citizens or towns in both States and buying and selling energy across the State line, so that the energy that either or both of these towns receive from time to time might be considered as intrastate and interstate energy commingled. The company is selling a like service in both towns and in one town it is selling this service at 20 per cent less than in the other town, and these towns are less than 300 miles apart. The town which has the higher rate complains. It can now complain to nobody. For example: If it now complains to the Georgia State agency the State agency simply replies by saying—

> We have approved the schedule of rates in Georgia and we have nothing to do with the schedule of rates in Alabama. That is Alabama's problem, and we can't adjust your rate downward so as to do away with this discrimination, because we have approved these rates as maximum allowable rates.

But by allowing this difference or discrepancy in rates, which has been found upon preliminary investigation to be a greater difference than the difference in cost to deliver a like service, there is created an unjust discrimination.

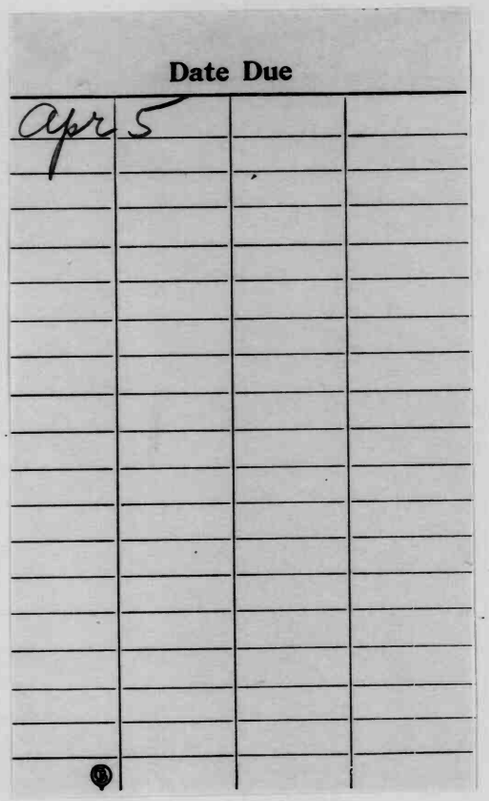
In their desperation the citizens of the Georgia community might go before the Alabama State commission—although informally, of course, since they would have no legal status before another State commission—and say, "Can you correct this evil?" The Alabama State commission says, "We have authority to fix maximum rates and we have authority to prevent unjust discrimination, but only in Alabama." (If that commission hasn't such power, we'll suppose that they get a law passed that gives them authority to fix maximum and minimum rates—that is, within the State of Alabama.) After the agencies have been clothed with all the power and authority that the legislatures could give, they are compelled to tell the complaining party that the situation is one which must be dealt with by both States in some way or by some authority representing

the several States in the Union. They, as one State agency, couldn't represent but just one State, and the problem is more than a 1-State problem. It might possibly be concerned with three or even more than three States. How can anybody say that an agency with authority over affairs in one State is going to deal with and solve a 2-State problem? But to give some authority properly representing these two States the power does not mean that you take away from either of these State authorities any power that they may properly exercise wihin the State.

Now, in the less complicated case, where there are two towns in the same State served by an interstate company, with sources of production both within and without the State, and delivering energy commingled from sources within and without the State in different proportions in such a way as to make impossible the contention that it was solely an intrastate service, there is also necessarily involved a question of discrimination as between the two States. How can this problem possibly be handled by State commissions, and how can anyone contend that the authority intended to be given the Federal commission would destroy the authority that the State may properly wield by itself?

The CHAIRMAN. We are very much obliged to you, gentlemen, and we will possibly have you back here at the next session of Congress to tell us all about it.

(Thereupon, at 11.48 o'clock a. m., the committee adjourned.)



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